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MODERN ENTRIES,
IN
ENGLISH:
BEING A
SELECT COLLECTION
OF
PLEADINGS

IN THE COURTS OF
KING'S BENCH, COMMON PLEAS,
AND EXCHEQUER: (*viz.*)

Declarations, Pleas in Abatement and in Bar, Replications,
Rejoinders, &c. Demurrers, Issues, Verdicts, Judgments;
Forms of Continuances, Discontinuances, and other Entries,
and of Entering Judgments, &c. in all Personal Actions:

And also all Kinds of WRITS Original and Judicial.

TRANSLATED FROM
THE MOST AUTHENTICK BOOKS,
BUT CHIEFLY FROM
Lutwich's, Saunders's, Ventris's, Salkeld's, and
the *Modern Reports*;

AND
From other *Cases* lately tried and adjudged, and wherein Writs
of *Error* have been brought, and *Judgments* affirmed:

TOGETHER WITH
READINGS AND OBSERVATIONS
On the several *Cases* in the *Reports*,

As well relating to the PRECEDENTS herein, as to all other *Cases* incident
to each particular TITLE; and the same abridged and disposed of in a
methodical Order.

TO WHICH ARE ADDED,
References to all the other Entries in the Books.

WITH THREE DISTINCT TABLES,
One of the PRECEDENTS, the Second of the CASES abridged,
and the Third of the NAMES of the CASES.

By JOHN MALLORY, Esq;

VOL. I.

THE FOURTH EDITION WITH ADDITIONS.

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To the Gentlemen of the L A W.

THESE ENTRIES, which were at first published anonymously in the year 1734, and were reprinted in the years 1735 and 1741, are now known to have been the TRANSLATIONS and READINGS of JOHN MALLORY, ESQ.—Notwithstanding so many EDITIONS, this WORK had become so SCARCE and DEAR as to induce the present EDITOR to REPRINT it, from an ARDENT desire of being USEFUL to the GENTLEMEN of that learned Profession, to whose PATRONAGE and PROTECTION he feels himself so HIGHLY INDEBTED.—To render this WORK in some degree more USEFUL many of the PRECEDENTS have been compared with the ORIGINALS; and where there appeared a VARIANCE it has been MARKED in the MARGIN; but so cautious has the EDITOR been that nothing should be INTERPOLATED or CHANGED, that he has not suffered an IOTA of the ORIGINAL TEXT to be ALTERED, but has even caused the original PREFACES to be REPRINTED as they were originally Published; and has also caused the paging of the ENGLISH EDITION to be PRESERVED for the sake of REGULARITY in REFERENCES. The EDITOR trusts the GENTLEMEN of the LAW will ACCEPT this MODERATE EXERCISE of LEGAL CRITICISM as a Proof of his HUMBLE WISHES to be of ADVANTAGE to THEM in whose SERVICE he has been TRAINED from his Infancy; to hope for, and from whom he has HITHERTO RECEIVED PROTECTION and SUPPORT in the ESTABLISHMENT of his LAW BOOK REPOSITORY, and whose future KINDNESS he presumes humbly to solicit,

No. 3, Christ-Church-lane,
DUBLIN,
Oct. 16th, 1790.

H. WATTS,

T H E

P U B L I S H E R T O T H E R E A D E R .

PREFATORY Recommendations of Books seldom answer the end proposed; for the more Extravagant they are, the more Suspicious. Experience tells us how palled are our Expectations, raised by a pompous Recommendation of a Book, which upon a Perusal falls far short of the Character given it by the Author. Under these Considerations we should have omitted saying any Thing of this Performance, but that there are few Books praised or perused, but what claim some Sanction from the known Repute and Esteem of the Author, against whom, if there are any Prejudices received, they are so far fetters to the free Use and Exercise of the Reader's Judgment, that they stifle his Powers of judging rightly. To prevent which (as much as lies in his Power) our *Author* has concealed his Name.

For it must be owned, in every Disposition we are not capable of forming a right Judgment, even of Things indifferent to us; much less where there is the least Prepossession. Therefore all here desired by the Author is, that the Reader will peruse this Performance of his with Candour and Good-nature. What he intends thereby is, that it may be useful three Manner of Ways. *First*, That the Practisers may have the Precedents in the Books of Authority translated into *English*, in as modern and easy Stile as the Nature of the Subject will bear; and that the Reader may be the better enabled to judge of them, he has inserted the several Exceptions (if any) that have been taken to those he has translated; and the Alterations made in Pursuance of such Exceptions, are printed in a different Character, or pointed out at the end of each Precedent. *Secondly*, As our Author had a Common Place of the Reports of adjudged Cases relating to the several Titles, he thought it might be of Use to divide them under their proper Heads, that the Reader may observe *In what instances those Actions will or will not lie; By and against whom to be brought; What is the usual Process; What Objections have been taken to Declarations and the several Pleadings therein; Of the Trial, Evidence, Verdict, Damages, Judgement and Execution, and other Matters incident thereto;* and that it might not be too prolix, after a few Instances under each of these Particulars, there are inserted only the Names of other

The Publisher to the Reader.

other Cases to be resorted to, wherein Disputes have arisen, and Determinations been given, to gratify the Reader's Inquiry: And a third Branch of this work is, that as it would be impossible here to insert the various and infinite Numbers of Precedents suitable to every Circumstance, the Reader is directed to other Precedents in the Books of Entries and Reports; for which end it may be observed that not only the Substance of *Townsend* and *Cornwall's* Tables are here placed relating to every Title therein, and branched into a much greater Number of Particulars, for the more ready finding them; but also the Precedents that are in other Books, subsequent in Time, are here referred to, and several other References inserted, which have as yet passed unobserved. Our Author is sensible of his own Inability to bring these his Endeavours near to any Degree of Perfection.

But lest it should be objected that there are but four Titles contained in this Book, let it be considered, how copious are Actions upon the Case, and how many various Species of Actions are comprehended under that Title, each of them containing a great Variety, and the Objection will no longer hold, since that Title might have been branched out into ten Particulars, and none omitted.

We have thought it proper to take Notice that a *Second Volume* is now in the Press, containing Actions of *Covenant*, *Debt*, *Detinue*, *Prohibition* and *Quare Impedit*; and the Third is designed to comprehend the Titles *Replevin*, *Trespass* and *Waste*; together with *General Entries*, *Judgments* and *Writs*, which is fitting for the Press with all convenient Dispatch.

As it must be confessed, that to endeavour at the publick Good, to promote the Interest of the Profession in which a Man is educated, and to desire that others may partake with him of any useful Collections in his Custody, is a laudable Attempt; our Author hopes he need not make any other Apology for his Exhibiting this to the Publick, to whom that it may be useful is all he desires.

A T A.

A T A B L E OF THE NAMES of the CASES.

Note, That the use of the Letters a, b, c, are to denote that the Cases are in such Pages inclining to the top, the middle, or the bottom of the Page.

And Note also, —No Folios being marked at the Top of each Page in this Edition, they are inserted in the Margins, marked thus *, for the Sake of Regularity in corresponding with the References in the Folio English Edition.

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Abatement.

SMALLWOOD, and Others, against the Bishop of
LITCHFIELD and COVENTRY, and Others.

AND the said *Bishop* and *Walter*, by *John Lutwich*, their at-Plea in a-
torney, come and defend the force and injury, and crave ^{to a quare} *abatement*
Oyer of the original writ of the aforesaid executors, and it is read ^{impedit,}
to them in these words: '*Elizabeth*, by the grace of God, of ^{that there}
' *England, France and Ireland*, queen, defender of the faith, &c. is no such
' to the sheriff of *Derby*, greeting: Command *William*, bishop ^{is no such}
' of *Coventry* and *Litchfield*, and *Walter Marsh*, clerk, that they ^{writ in the}
' justly, and without delay, permit *Humphrey Smallwood, Richard*
' *Sale*, clerk, and *Thomas Sale*, clerk, executors of the testament ^{writs.}
' of *William Sale*, clerk, to present a proper person to the arch- ^{Lut. 2.}
' deaconry of *Derby*, which in the life of the aforesaid *William*
' *Sale* was, and still is vacant, and which (as it is said) did in the
' lifetime of the said *William*, belong to his donation, and doth
' now belong to the donation of them the said *Humphrey* and *Thomas*,
' executors of the will of the aforesaid *William*; And whereupon
' they complain, that the aforesaid *Bishop* and *Walter* unjustly dis-
' turbed the said *William* the testator in his life-time, (whose exe-
' cutors the said *Humphrey, Richard* and *Thomas* are) to the present
' delay of the execution of the last will and testament of the said
' *William*: And unless they so do, and if the said *Humphrey*,
' *Richard* and *Thomas* make you secure of prosecuting their claim,
' then summon, by good summoners, the aforesaid *Bishop* and
' *Walter*, that they be before our Justices at *Westminster*, from the
' day of *St. Michael*, in fifteen days, to shew cause why they will
' not; and have you there the *Summoners*, and this writ. Wit-
' nefs our self at *Westminster*," this nineteenth day of *July*, in the
VOL. I. B. ' thirtieth

Note; It may be perceived that the word *dicit*, in a *plea*, is translated
that the defendant pleads that, &c. and such translation is apprehended to be
right; for *dico* is to declare, plead, aver, affirm or answer, according to the
subject matter to which it is applied; and therefore the reader is desired to
make use of it in that manner throughout the rest of the pleadings in
abatement.

• In *Lut. 2.* it is when, &c.

Abatement.

‘thirtieth year of our reign.’ Which being read and heard, the said *Bishop* and *Walter* plead, That there is not any form of any writ of *quare impedit* in the register of original writs for an executor or executors of any person, for any disturbance made to a testator’s presenting to an ecclesiastical dignity ; And that by the aforesaid writ it is supposed, That the aforesaid archdeaconry is vacant ; in which case the aforesaid executors might have had a writ of *quare impedit*, for a disturbance made to them after the death of the said testator : And also, the said writ contains in itself a double disturbance, one to the said testator, and another to the said executors : And also by the said writ, the said disturbance which was made to the aforesaid testator, in his life-time, is supposed to have been a disturbance to the delay of the execution of the said will, which could not in any wise be ; and this they are ready to verify ; wherefore, inasmuch as the said writ, issued in the manner aforesaid, is not warranted by the register of original writs, they pray judgment of the said writ, and that the same may be quashed, &c.

(P 2)

The jurisdiction of the Court of Admiralty pleaded.

Clift 17.

(Or thus, Comes and defends himself against the force and injury.

(Or thus, Comes and defends himself against the charge of the force and injury.)

And the said *T. M.* by *Richard Carter*, his Attorney, comes and defends the * force and injury, and pleads, that cognizance of pleas of taking any thing upon the high seas, hath time out of mind belonged and appertained, and doth now belong and appertain to the Court of Admiralty, and not to any other court ; and that such pleas have been used and accustomed to be tried and discussed in the said Court of Admiralty, according to the civil and maritime laws. And the said *T. M.* further pleads, that he took and carried away the goods and chattels, in the declaration mentioned, upon the high seas for a maritime cause, which said taking and carrying away of the said goods and chattels upon the high seas, in the manner aforesaid, are the same taking and carrying away whereof the said *W.* above complains, Without thar, That he the said *T. M.* took the said goods and chattels on shore, at *Eccles* aforesaid, or any where else but upon the high Seas ; and this he is ready to verify : Wherefore, inasmuch as the cognizance of the plea aforesaid doth belong to the Court of Admiralty, the said *T. M.* prays judgment, if this honourable court will have any further cognizance of the aforesaid plea, &c.

Because the defendants are nieces and not sisters to William,

And the aforesaid *C.* and *E.* in their proper persons, come and defend the charge of the force and injury, and pray judgment of the said writ, because they aver, that the said *K.* and *P.* are nieces to the said *William*, (that is to say) daughters of *R. B.* and *Grace* his

* The defendant, strictly speaking, does not defend the force and injury, for that cannot properly be defended, but rather denies it, and therefore defends himself against the charge of the force and injury by the matter subsequent contained in his plea, which is the reason I have here said, that the defendant defends himself against the force and injury laid to his charge ; but if defending the force and injury may be understood to be the same as denying it, then the reader may use the words, *comes and defends the force and injury*. Vide 3. Black. Com. 297. The principal case is in *Saville* 94 and 118.

Abatement.

his wife, which said *R.* was brother to the said *William*, without that, that the said *K.* and *P.* are sisters of the said *William*, as by the said writ above is supposed; and this the said *C.* and *E.* are ready to verify: wherefore they pray judgment of the aforesaid writ, and that the same may be quashed, &c.

And the aforesaid *J. C.* in his proper person comes and defends himself against the force and injury laid to his charge, and pleads, that he, long before the said *Dorothy* exhibited her said bill, was, and ever since hath been, and now is an Attorney of his present Majesty's Court of Common Bench at *Westminster*, as by the process to this plea annex'd, under the seal of the same court, may appear; and that he is prosecuting and defending divers suits, pleas, and affairs of divers liege people and subjects of his present Majesty, in the same Court of Common Bench, as their Attorney. And the said *J.* avers, that he, and all other Attornies of the same Common Bench, by a laudable and ancient custom, and according to the law of this kingdom, and the liberties and privileges of the said Common Bench, there, time out of mind used and approved of, ought not to be forced or compell'd to answer before any Justices, or other Officers of our said Sovereign Lord the King, or other Judges whatsoever, in any court, except before the Justices of the Common Bench of our said Sovereign Lord the King at *Westminster*, upon any pleas or complaints (pleas of freehold, felonies and appeals only excepted;) and this he is ready to verify; wherefore he prayeth judgment, whether he ought to be compell'd to answer to the said *Dorothy*, in the aforesaid * plea, and so forth.

That the defendant is an Attorney of the Common Pleas.

(P 3)

And the aforesaid *John*, by *John Schullam*, his Attorney, and the aforesaid *Henry*, by *Josiah Nelson* his Attorney, come and defend themselves against the force and injury, and plead, that the said *Robert* ought not to have an answer to his said writ of privilege, or to be admitted to have the privilege of an Attorney of this court, because they aver (or shew) that the aforesaid *Henry*, before the issuing out of that same writ (*to wit*) in *Trinity Term*, in the second year of the reign of our Sovereign Lord the King that now is, came here into this court, by *Josiah Nelson* his Attorney, and exhibited to the Justices here his bill of complaint, by the name of *Robert L*—Gent. one of the Attornies of his said present Majesty's

A plea to an action brought by an Attorney, that he was fore-judged.

B 2

Court

* I apprehend it very proper to preserve the word *plea* here, in this and several other places hereafter, as a technical term of art, and well understood by the profession; for *placitum* sometimes signifies the substance of the defendant's defence, or of the plaintiff's reply thereto, and so of the defendant's rejoinder, they are all call'd *placita*: But here in this and several other instances, it signifies the very controversy or matter in variance. As in *Lutt. 25.* where the defendant concludes his plea, that he ought not to answer in *placito præd.* (that is) in the said plea or action; so in a prohibition it is mentioned in the *Gavamen*, that the defendant *traxit* the plaintiff in *placitum* into the court christian, *i. e.* drew him into a suit or controversy.

Abatement.

Court of Common Bench, present here in court, in his proper person, of a plea of debt (or in an action of debt) the tenor of which bill followeth here in these words : To his Majesty's Justices of the Common Bench, *Suffolk* (to wit) *Henry Blomfield*, by *Josiah Nelson*, his Attorney, complains of *Robert L——* Gent, one of the Attornies of his present Majesty's Court of Common Bench, present here in court, in his proper person ; for that the said *Robert* doth unjustly detain, and hath not render'd to the said *Henry* forty pounds, which he oweth him ; for that whereas the aforesaid *Robert*, the twentieth of *April*, in the second year of the reign of his present Majesty, borrowed of the aforesaid *Henry* the said forty pounds, to be paid to him whenever he the said *Robert* should be thereto required. Nevertheless the said *Robert*, altho' often required, hath not rendered to the said *Henry* the said forty pounds, but hitherto hath, and now doth altogether refuse so to do ; wherefore he declares that he is injured, and endamaged to the value of forty pounds, and therefore brings his suit, and the pledges of prosecuting are *John Doe* and *Richard Roe* ; whereupon, altho' it was incumbent on the said *Robert*, by reason of his office as an Attorney, to be here in court, and tho' solemnly required to appear and attend in this court, in his said office of an Attorney, yet he came not here into this court, nor alledged to this court any reason for his absence ; therefore it was considered, that the aforesaid *Robert*, for his contempt in this particular, should be fore-judged from executing his said office of an Attorney, and should be entirely struck out of the roll of Attornies in this court, until, &c. as by the record and proceedings thereof, remaining here in this court, more fully may appear ; which said judgment remaineth in its full force and effect, neither revoked, reversed, vacated or annulled, by which the said *Robert*, at the day of issuing his said writ of privilege, was, and before had, and ever since hath been, and now is entirely removed from and deprived of his said office of an Attorney of this court, Without that, That the said *Robert* is, or at the day of issuing the aforesaid writ was, or at any time since hath been an Attorney of this court, as by the said writ above is supposed ; and this he is ready to verify ; wherefore he prayeth judgment, whether the said *Robert* ought to receive any answer to his writ aforesaid, or be admitted to have his privilege of this honourable court, &c.

(P 4)

Plea, administrators, and not executors. And the aforesaid *R.* by *J. M.* his Attorney, comes and defends himself against the said charge of the force and injury, and pleads That the said *John Heard*, on the fifth day of *December*, in the year of our Lord one thousand six hundred ninety-four, at *London* aforesaid, in the said parish and ward, died intestate ; after whose death, administration of all and singular the goods and chattels, rights and credits, which were the property of the said *J. H.* at the time of his death, by the Worshipful Sir *Charles Hedges*, Knight, Doctor of Laws, lawfully constituted commissary and sequestrator general

Abatement.

general to the Reverend Father in Christ, *Henry* by divine permission, Lord Bishop of *London*, in the divisions of *Essex* and *Hertfordshire*, to whom the commission of administration aforesaid then did and now doth of right belong, on the eighth day of *February*, in the year of our Lord one thousand six hundred ninety-four, at *London* aforesaid, in the parish and ward aforesaid, was granted to the said *R. Heard*, in due form of law; in which case the aforesaid *E.* and *M.* ought to have named the said *Robert* in the said writ, as administrator of the goods and chattels which were the property of the said *J. H.* and not executor of the last will and testament of the said *J. H.* and this he is ready to verify; wherefore he prayeth judgment of the aforesaid bill, and that the same may be quashed, &c.

And the aforesaid *J.* in his proper person comes and defends the force and injury, and pleads, that in *Easter* Term, in the fifth year of the reign of our late Sovereign Lord *William* the Third, and our late Sovereign Lady *Mary*, late King and Queen of *England*, &c. on *Tuesday* next after fifteen days of *Easter*, that same term, Sir *John Holt*, Knight, then the Chief Justice, assign'd to hold pleas in the court of our said late Sovereign Lord and Lady, the King and Queen, before themselves, * *Gratis*, gave and granted to the said *J. W.* the Office of Filazer in the court of the said late King and Queen, before themselves, and then and there admitted the said *J. W.* to the same Office of Filazer, of the county of *Salop*, to have and to hold to him as his freehold, for the term of his life, according to the custom of the said court used and approved of in the time of the said King and Queen, and that instant placed and instituted the same *James Woodhouse* into the personal possession of the said office, the said *James Woodhouse* having taken as well the oath of allegiance to the said late King and Queen, according to the form of the statute in such case made and provided, as also the usual oath by him first to be taken, well and faithfully to carry and behave himself in that office; to have, occupy and enjoy the same in the manner aforesaid, together with all fees, advantages and profits to the same office incumbent, and anciently due and accustomed to be paid, as by the record of the said grant and admission remaining in the court of our Sovereign Lord the King that now is, before the King himself, may appear; by virtue of which grant and admission, he the said *James*, long before, and at the day of the issuing of the original writ aforesaid, was, and now is a filazer of the said Court of King's Bench, as aforesaid. And the said *J.* further pleads, that time out of mind, such filazers of the said court of our said Sovereign Lord the King here, according to the custom

A plea of privilege, that the defendant in a Filazer of the King's Bench.

(P 5)

* The word *gratis* is by common use made an *English* phrase of speech, and by every one understood to signify without fee or reward; and therefore I thought fit here to make use of it in this, and several other instances of the like nature.

Abatement.

of the same hitherto used and approved of in the same court, have been accustomed to be impleaded in all personal actions, at the suit of any subject of our Sovereign Lord the King, and his predecessors, kings and queens of this kingdom, by bill exhibited in the said court, before the king himself, against such filazers present in the same court, in their proper persons; and of right ought so to be; and this he is ready to verify; wherefore, he prays judgment, if this court of our said Sovereign Lord the King will here take any further cognizance of the aforesaid plea against the said *J. &c.*

FERRERS against WILLIAMS.

Plea in
abatement,
by which
the defend-
ant confesseth the
death of
William
White
without
issue, and
that the
plaintiff
was cousin
and heir;
but further
saith, that
the said
William
White, the
sixth of
September,
1660, by
his will de-
vised all the
lands, &c.
to the plain-
tiff in tail,
with several
remainders
over: that
the plain-
tiff, by the
death of the
said Wil-
liam White,
was seised
of the re-
version in
tail.
Lutw. 1557.
N. L. 493.

And the aforesaid *Frances*, by *Sylvesster Petit*, her attorney, comes and defends the force and injury, and pleads, That true it is, that the said *William White*, on the eighteenth day of *November*, in the third year of the reign of his present Majesty King *Charles* the second, at *Bashall* aforesaid, died seised of the reversion of the said tenements mentioned in the said writ, without any issue of his body begotten upon the body of the said *Frances*; and that the said *John Ferrers* is cousin and heir to the said *William*, in such manner and form as he the said *John Ferrers* doth by his writ and declaration above suppose. But the said *Frances* in her defence further pleads, that the said *William White*, being seised of the reversion of the said tenements, with the appurtenances, in the manner aforesaid he the said *William White*, on the sixth day of *September*, in the year of our Lord one thousand six hundred sixty-six, at *Bashall* aforesaid, made his last will and testament in writing, and thereby directed and appointed, that if he should have issue of his body, such issue should have and enjoy all his real estate in his manors, lands, tenements and hereditaments; and for default of such issue, that then all his manors, lands, tenements and hereditaments should come and remain to his nephew *John Ferrers*, (the now plaintiff) and to the heirs of his body; and for default of such issue, to his nephew *Philip Ferrers*, and the heirs of his body; and for default of such issue, to his nephew *George Newton*, his heirs and assigns for ever; and afterwards, (*to wit*) on the eighteenth day of *November*, in the thirteenth year of the reign of his present Majesty, at *Bashall* aforesaid, he the said *William White* died seised of the reversion mentioned in the said writ, without having any issue of his body begotten, after whose death, she the said *Frances* entered into the tenements and premises aforesaid, with the appurtenances, and was, and now is thereof seised in her demesne as of a freehold, for the term of her life; and the aforesaid *John Ferrers*, by virtue of the aforesaid devise, became, was, and now is seised of the said reversion in his demesne, as of a fee-tail (*to wit*) to him, and the heirs of his body issuing, Without that, that the tenements aforesaid,

Abatement.

(P6)

said, after the death of the said *William White*, descended to the said *John Ferrers*, as cousin and heir to the said *William White*, as by the declaration above is supposed; and this he is ready to verify; wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

And traverseth the descent to the plaintiff alledged in the court. The statute of additions pleaded.

And the aforesaid *J.* and *J.* in their proper persons, come and defend the force and injury, and pray judgment of the aforesaid writ, because they plead that according to the form of the statute of additions in writs, in which process of outlawry lieth, the addition of the vill, hamlet, place and county of the commorancy of the said *John* ought to have been expressed in the said original writ of the said *Thomas*; and this he is ready to verify; wherefore, inasmuch as such addition is not expressed in this writ, the said *J.* and *J.* pray judgment of the said writ, and that the same may be quashed, &c.

And the aforesaid *Ch.* by *F. Gibson*, his attorney comes and defends the force and injury, and prays judgment of the aforesaid writ, because he pleads, that he is, and at the time of issuing the aforesaid original writ was, and long before had been a person of the said church, inducted into the same, on the presentation of *Isaac Welham*, Gent. And the said *C.* hath not, nor claimeth to have any thing in the advowson of the said church, or in the said church, but as parson thereof, inducted therein, on the presentation of the said *J.* which said *J.* is now alive, and in perfect health, (to wit) at *Thornton* aforesaid; and this he is ready to verify; wherefore, inasmuch as the said *Isaac* is not named a defendant together with the said *Ch.* in the aforesaid writ, he prays judgment of the said writ, and that the same may be quashed.

Abatement in quare impedit, that the patron is not named in the writ with the parson. 2 Lut. 1088. N. L. 345.

BROWN and DEEBLE.

And now here at this day, (to wit) on *Wednesday* next after 15 Special days of *Easter*, this same term, (till which day the aforesaid *H.* saving to himself all and all manner of exceptions as to the said bill of the aforesaid *E.* as to the said declaration, had leave to imparl, and then to answer, &c. before which day our said late Sovereign Lady the Queen departed this life) comes as well the said *Edward*, by his attorney aforesaid, as the said *H.* by *R. S.* his attorney; and the said *H.* defends the force and injury, and pleads, that he the said *H.* ought not to be compelled to answer to the said writ, because he avers, that the said *Edward* lately (to wit) in *Trinity* term last past, in his present Majesty's Court of Common Bench at *Westminster*, impleaded the aforesaid *H.* in a certain plea of trespass upon the case, and for the same cause in the declaration above-mentioned, as by the record thereof, now remaining in the same court of Common Bench, may appear; and that the parties

The demise of the Queen.

Plea of another action depending in the Common Pleas. Lilly 7. Salk. 715.

aforesaid,

Abatement.

(P 7)

aforesaid, to and in the said plea, in the said court of Common Bench, and the aforesaid *E. B.* the now plaintiff, and the said *H. D.* are the same, and not different persons; and that the plea aforesaid, now remains undetermined in the same court of Common Bench; and this he is ready to verify; wherefore, he prays judgment, whether he ought to be compelled to make any answer to the aforesaid writ, &c.

Misprision
of commo-
rancy.

And the said *Alexander*, by *John Morgan*, his attorney, comes and defends the force and injury, and prays judgment of the said writ, because he pleads, That he now doth, and at the day of suing out the said original writ of the aforesaid *C.* did, and for many years before had, and ever since hath inhabited and dwelt in the parish of *St. Dunstan's* in the west, in *London*, Without that, that he the said *A.* at the day of suing out the said writ, did, or at any time before or since had, or now doth inhabit and dwell in the parish of *St. Clements Danes*, in the county of *Middlesex*, as the said *C.* doth above suppose by his said writ; and this he is ready to verify; wherefore, he prays judgment of the said writ, and that the same may be quashed, &c.

Abatement
for a vari-
ance be-
tween the
writ and
the count,
for that he
brings the
writ as a
knight and
baronet,
and counts
as an esq;

And the aforesaid *L.* by *William Stibbs*, his attorney, comes and defends the force and injury, and craves *Oyer* of the writ aforesaid, and it is read to him in these words, *George*, &c. [reciting the writ] which being read and heard, he the said *L.* prays judgment of the writ aforesaid, because he pleads, that between the writ and the declaration aforesaid, there is a manifest variance, for that the said *J.* hath brought his writ aforesaid against him the said *L.* by the name of *L. B. Knight and Baronet*, and declared against him upon that writ, by the name of *L. B. Armiger*, and not by the name of *L. B. Knight and Baronet*, as the said *J.* ought to have declared; and this he is ready to verify; whereupon, the said *B.* for the variance aforesaid, prays judgment of the writ, and that the same may be quashed, &c.

To an action
brought
by a feme
sole, the
defendant
pleads in
abatement
of the writ,
that the
plaintiff is
covert of
J. B. at the

And the aforesaid *Richard*, by *J. M.* his attorney, comes and prays judgment of the writ aforesaid, because he avers, that the aforesaid *Elizabeth*, on the day of her obtaining of the said original writ (that is to say) on the first day of *June*, in the sixth year of the reign of our Sovereign Lord the King, was, and ever since hath been, and now is, covert of one *John Bland*, her husband, (that is to say) at *London*, in the parish and ward aforesaid: and this he is ready to verify; wherefore, he prays judgment of the writ aforesaid, sued out by the said *Elizabeth*, by the name of *Elizabeth S.* widow, as a feme sole, and that the same may be quashed, &c.
day of the writ purchased.

Abatement
of the ori-
ginal writ
in quare
impedit.

And the aforesaid *Bishop*, and the said *J. K.* come and crave *Oyer* of the original writ, and it is read to them in these words, *George*, &c. [reciting the writ] which being read and heard, they the said *Bishop* and *J. K.* pray judgment of that writ, because they plead that the same writ doth not agree with the form of the writ
in

Abatement.

in the register, in such case ordained and provided, for that they aver, that the said writ wants this word (*unjustly*): and this they are ready to verify; whereupon, (or) *for which reason* they pray judgment of that writ, and that the same may be quashed, &c.

BARTELOT against BURTON.

(P 8)

And the said *Henry* replies, that the said *Anne*, notwithstanding any thing above alledged, ought to answer to his said writ, because he avers, that the said *Henry*, in *Hillary* Term last past, impleaded the said *Anne* in the plea aforesaid, here in his Majesty's court of Common Bench; and the said *Henry* there declared, in the same *Hillary* term, against the said *Anne* in the same court, in the aforesaid plea; and the said *Anne*, in the same *Hillary* term, by the aforesaid *Peter Budger*, her attorney, came and defended the force and injury when, &c. and then prayed leave to imparl to the said declaration until fifteen days from *Easter*, then next following, and such leave she had accordingly; the same day was given to the same *Henry* here, &c. as by the record and proceedings thereof, now remaining here in this court, may appear; and the aforesaid *Anne*, at the aforesaid fifteenth day from *Easter*, pleaded in the manner and form aforesaid. And the said *Henry* avers, that the said plea, in the manner and form above pleaded, after the said leave to imparl, and the matter therein contained, are not sufficient in law to preclude the said *Henry* from having a proper answer to his said writ, to which said plea, he the said *Henry* is under no necessity to answer thereto, in any other manner howsoever; and therefore, the said *Henry* prays judgment, and that the said *Anne* may further answer to the writ aforesaid, &c.

Replication to a plea of coverture, that the defendant is concluded by way of estoppel, by reason of her imparlance.
Lutw: 23.

Vide 2d. Keb. 134. PerrinCarbs case.

And the said *John Lascells*, of *Attleburgh*, in the county of *Norfolk*, Esq; and *Anne* his wife, by *Robert Martin*, their attorney, come and plead, that they are the same persons against whom the aforesaid *Lewis*, who sueth in this case, as well for our Sovereign Lord the King as for himself, brought his writ aforesaid, by the name of *John Lascells*, late of *Addlebury* in the county of *Norfolk*, Esq; and *Anne* his wife, and they pray judgment of the writ aforesaid, because they aver, that in the aforesaid county of *Norfolk* there is nor, or at the day of suing out the original writ of him the said *Lewis* who sueth in this case, as well, *and so forth*, was, or at any time before had there been any such town, hamlet, or any other place known or called by the name of *Addlebury*, as the aforesaid *Lewis*, who, *and so forth*, doth by his writ aforesaid suppose; and this they are ready to verify; whereupon, inasmuch as the said *John Lascells*, and *Anne*, are not named in certain of what town or hamlet the said *John* and *Anne* were, or are inhabiting, according to the form of the statute in such case made and provided, they pray judgment of that writ, and that the same may be quashed, &c.

A plea in abatement of the writ, that there is no such town or hamlet, to a qui tam.

Robert

Abatement.

Misnomer in the Sur-name. *Robert Syms*, against whom the said *T. H.* hath exhibited his aforefaid bill, by the name of *Robert Symonds*, by *J. L.* his attorney, comes and defends the force and injury, and prays judgment of the aforefaid bill, because he pleads that he is the same person against whom the aforefaid *T. H.* hath exhibited his said bill, by the name of *Robert Symonds*; and that he now is, and at the time of the exhibiting the said bill was, and from the time of his nativity always hitherto hath been called and known by that name and surname (*to wit*) at *London* aforefaid, in the parish and ward aforefaid, without that, that he now is, or at the time of exhibiting the said bill against him, was, or at any time before had or since hath been called or known by the name of *Robert Symonds*, as the said *T.* in his said bill hath alledged; and this he is ready to verify; and therefore prayeth judgment of the aforefaid bill, and that the same may be quashed, &c.

4 Mod. 347.
6 Mod. 115.
1 Salk. 6, 75.
Mod. Cases 289.
Lilly 1.
(P 9)
Pract. Reg. 5. 10. Co. 122. 11 Co. 21.

RAPER at the Suit of SWAINE.

Plea that the Plaintiff is an Alien Enemy. *And the aforefaid Edward*, by *T. S.* his attorney, comes and defends the force and injury, and pleads, that the said *Edward* is not entitled to an answer to the aforefaid bill because he avers, that the said *Edward* is an alien, born at *Calais*, in the kingdom of *France*, in parts beyond the seas, under the ligeance of *Lewis* the *French* king, an enemy to our sovereign Lord, now king of *Great Britain*, &c. born of a father and mother adherents to the enemies of our said sovereign Lord the King. And the said *Edward* came hither into *England* without the safe conduct of our said sovereign Lord the King. And this he is ready to verify; whereupon he prays judgment whether he ought to answer to the aforefaid bill, &c.

1 Salk. 246.
Lilly 1.
Pract. Reg. 18. 4 Co. 55.

BRACKLEY against STANTON.

Coverture pleaded. *And the aforefaid Sarah*, in her proper person, comes and prays judgment of the aforefaid bill of the said *William*, because she avers, that she the said *Sarah*, at the time of exhibiting of the same bill of the said *William* against the said *Sarah*, was covert of *J. W.* then and now being her husband, and actually alive (*to wit*) at *Isington* aforefaid, in the county aforefaid; and this the said *Sarah* is ready to verify. And by reason the said *J. W.* is not named in the aforefaid bill, she the said *Sarah* prays judgment of the aforefaid bill, and that the same may be quashed, &c.

Mod. Cases 230.
Ray. 395.
Lilly 1.
Pract. Reg. 8.
Salk. 7, 8.

A Replication thereto. *And the said William* replies, that the said bill of the aforefaid *William* ought not to be quashed for any thing by the said *Sarah* above in pleading alledged; because he avers, that the said *Sarah*, at the said time of the exhibiting the said bill (*to wit*) on the twenty-third

Abatement.

ty-third day of *October*, in the fifth year of the reign of his present majesty *George* the second, King of *Great Britain*, &c. (*to wit*) at *Iffington* aforesaid, in the county aforesaid, was sole and uncovert with the said *J. W.* without that, that the aforesaid *Sarah*, at the aforesaid time of exhibiting the aforesaid bill was, or at any time afterwards hath been covert of the aforesaid *J. W.* her husband, in such manner and form as the said *Sarah* above in pleading hath alleged; and this he is ready to verify; wherefore he prays judgment, and his said debt, together with his damages, occasioned by detaining the same to be adjudged to him, &c.

LEVETT, at the Suit of the College of Physicians, (P 10) of London.

And the aforesaid *H. L.* by *R. S.* his attorney, comes and prays Misnomer Judgment of the aforesaid bill, because he pleads, that the aforesaid *H.* long before the time of exhibiting the aforesaid bill, had been, then was, and now is a doctor of physick, duly made so by the University of *Oxford*, (*to wit*) at *London* aforesaid, in the parish and ward aforesaid; wherefore, inasmuch as he the said *Henry* is not named a doctor of physick in the aforesaid bill, he prays judgment thereof, and that the said bill may be quashed, &c.

Misnomer
of Addition
of Degree.
1 Salk. 7.
Lilly 2, 4
Mod. 47. 1
Ld. Raym.
472.

And the aforesaid *T. S.* by *Robert Martin*, his attorney, comes and defends the force and injury, and craves oyer of the aforesaid writing obligatory, and it is read to him in these words, ff. *Noverrint universi per presentes*, [here recite the bond] which being read and heard the said *T. S.* prays judgment of the aforesaid writ, because he avers, that at the aforesaid time of the sealing and delivery of the aforesaid writing obligatory, whereon the aforesaid plaintiff complains against the said defendant; (that is to say) upon the said second day of *May*, in the fifth year of the reign of his present Majesty *George* the second, King of *Great Britain*, &c. in the said declaration above-mentioned, at *Lewes* aforesaid, in the county aforesaid, the aforesaid *E. F.* and *G. H.* named in the said writing obligatory, together with the said *T. S.* likewise sealed and delivered the said writing obligatory, as the joint act and deed of the said *E. F. G. H.* and the said *T. S.* and thereby became firmly bound jointly to the aforesaid plaintiff, in the aforesaid one hundred pounds, which said *E. F.* and *G. H.* are now actually alive. Wherefore, inasmuch as the said *E. F.* and *G. H.* are not joined Defendants together with him the aforesaid *T. S.* in the declaration mentioned, the said *T. S.* prays judgment of the said writ, and that the same may be quashed, &c.

Abatement,
that the
Defendant
sealed the
Bond joint-
ly with *E. F.*
and *G.* who
are not
named.
5 Mod. 144.
Lilly 2.

MOLLER and ISTD.

And the aforesaid *T.* in his proper person comes and defends the force and injury, and prays judgment of the aforesaid bill, because

Another
Action
he

Abatement.

Misnomer *Robert Syms*, against whom the said *T. H.* hath exhibited his
in the Sur- aforesaid bill, by the name of *Robert Symonds*, by *J. L.* his attor-
name. ney, comes and defends the force and injury, and prays judgment
4 Mod. 347. of the aforesaid bill, because he pleads that he is the same person
6 Mod. 115. against whom the aforesaid *T. H.* hath exhibited his said bill, by
1 Salk. 6, 75. the name of *Robert Symonds*; and that he now is, and at the time
Mod. Cases 289. of the exhibiting the said bill was, and from the time of his nati-
Lilly 1. vity always hitherto hath been called and known by that name and
(P 9) surname (*to wit*) at London aforesaid, in the parish and ward afore-
Pract. Reg. said, without that, that he now is, or at the time of exhibiting the
5. 10. Co. said bill against him, was, or at any time before had or since hath
122. 11 Co. been called or known by the name of *Robert Symonds*, as the said
21. *T.* in his said bill hath alledged; and this he is ready to verify; and
therefore prayeth judgment of the aforesaid bill, and that the same
may be quashed, &c.

RAPER at the Suit of SWAINE.

Plea that And the aforesaid *Edward*, by *T. S.* his attorney, comes and de-
the Plaintiff fends the force and injury, and pleads, that the said *Edward* is not
is an Alien entitled to an answer to the aforesaid bill because he avers, that
Enemy. the said *Edward* is an alien, born at *Calais*, in the kingdom of
1 Salk. 2, 46. *France*, in parts beyond the seas, under the ligeance of *Lewis* the
Lilly 1. *French* king, an enemy to our sovereign Lord, now king of *Great*
Pract. Reg. *Britain*, &c. born of a father and mother adherents to the enemies
18. 4 Co. 55. of our said sovereign Lord the King. And the said *Edward* came
hither into *England* without the safe conduct of our said sovereign
Lord the King. And this he is ready to verify; whereupon he
prays judgment whether he ought to answer to the aforesaid
bill, &c.

BRACKLEY against STANTON.

Coverture And the aforesaid *Sarah*, in her proper person, comes and prays
pleaded. judgment of the aforesaid bill of the said *William*, because she
Mod. Cases, avers, that she the said *Sarah*, at the time of exhibiting of the
230. same bill of the said *William* against the said *Sarah*, was covert of
Ray. 395. *J. W.* then and now being her husband, and actually alive (*to wit*)
Lilly 1. at *Islington* aforesaid, in the county aforesaid; and this the said *Sa-*
Pract. Reg. 8 *rah* is ready to verify. And by reason the said *J. W.* is not named
Salk. 7, 8. in the aforesaid bill, she the said *Sarah* prays judgment of the afore-
said bill, and that the same may be quashed, &c.

And the said *William* replies, that the said bill of the aforesaid
A Replica- William ought not to be quashed for any thing by the said *Sarah*
tion thereto. above in pleading alledged; because he avers, that the said *Sarah*,
at the said time of the exhibiting the said bill (*to wit*) on the twen-
ty-third

Abatement.

ty-third day of *October*, in the fifth year of the reign of his present majesty *George* the second, King of *Great Britain*, &c. (*to wit*) at *Issington* aforesaid, in the county aforesaid, was sole and uncovert with the said *J. W.* without that, that the aforesaid *Sarah*, at the aforesaid time of exhibiting the aforesaid bill was, or at any time afterwards hath been covert of the aforesaid *J. W.* her husband, in such manner and form as the said *Sarah* above in pleading hath alledged; and this he is ready to verify; wherefore he prays judgment, and his said debt, together with his damages, occasioned by detaining the same to be adjudged to him, &c.

LEVETT, at the Suit of the College of Physicians, (P 10) of London.

And the aforesaid *H. L.* by *R. S.* his attorney, comes and prays Judgment of the aforesaid bill, because he pleads, that the aforesaid *H.* long before the time of exhibiting the aforesaid bill, had been, then was, and now is a doctor of physick, duly made so by the University of *Oxford*, (*to wit*) at *London* aforesaid, in the parish and ward aforesaid; wherefore, inasmuch as he the said *Henry* is not named a doctor of physick in the aforesaid bill, he prays judgment thereof, and that the said bill may be quashed, &c.

And the aforesaid *T. S.* by *Robert Martin*, his attorney, comes and defends the force and injury, and craves oyer of the aforesaid writing obligatory, and it is read to him in these words, *fi. Novum rint universi per presentes*, [here recite the bond] which being read and heard the said *T. S.* prays judgment of the aforesaid writ, because he avers, that at the aforesaid time of the sealing and delivery of the aforesaid writing obligatory, whereon the aforesaid plaintiff complains against the said defendant; (that is to say) upon the said second day of *May*, in the fifth year of the reign of his present Majesty *George* the second, King of *Great Britain*, &c. in the said declaration above-mentioned, at *Lewes* aforesaid, in the county aforesaid, the aforesaid *E. F.* and *G. H.* named in the said writing obligatory, together with the said *T. S.* likewise sealed and delivered the said writing obligatory, as the joint act and deed of the said *E. F. G. H.* and the said *T. S.* and thereby became firmly bound jointly to the aforesaid plaintiff, in the aforesaid one hundred pounds, which said *E. F.* and *G. H.* are now actually alive. Wherefore, inasmuch as the said *E. F.* and *G. H.* are not joined together with him the aforesaid *T. S.* in the declaration mentioned, the said *T. S.* prays judgment of the said writ, and that the same may be quashed, &c.

MOLLER and ISTED.

And the aforesaid *T.* in his proper person comes and defends the force and injury, and prays judgment of the aforesaid bill, because

he

Abatement.

pending in the same Court.
 2 Salk. 715.
 Moor 539.
 8 Co. 118.
 2 Ven. 170.
 2 Cro. 481.
 Noy 82.
 Bird 122.
 5 Co. 61.
 Prac. Reg. 7.
 Salk. 8.
 Lilly 2.

he pleads, that the aforesaid *J.* here in this Court lately (*to wit*) in *Easter* term last past, brought his writ against the said *T.* of the plea aforesaid, and thereupon the said *J.* in declaring against the said *Thomas*, by the name of *T. J.* late of *London*, gent. then and there appearing at the suit of the said *J.* in the aforesaid plea (or action *did complain, that whereas* [and so set forth the declaration] as by the said record thereof, now remaining here in this court may appear; which said plea, (or action) issued upon the aforesaid writ, in form aforesaid, is yet pending here in this honourable court at *Westminster* aforesaid, undiscussed, undetermined, and not discontinued. And the said *T.* further pleads, that the aforesaid *J. M.* named in the aforesaid declaration, and the aforesaid *J. M.* named in the aforesaid bill, now exhibited against him the said *T. J.* are one and the same, and not different persons; and that the said *T. J.* in the aforesaid declaration and plea named, and the aforesaid *T. J.* mentioned in the said bill exhibited against the said *T. J.* are one and the same, and not different persons. And the aforesaid *T. J.* further saith, that the cause of action in the aforesaid declaration above pleaded mentioned, and the cause of action, of which the said *J.* now complaineth against the said *T.* are one and the same, and not different causes of action; wherefore he prayeth judgment of the aforesaid bill exhibited in form aforesaid, and that the same may be quashed, *and so forth.*

CARTER at the Suit of BENNETT.

Infancy pleaded by Guardian.
 Lilly 3.
 Prac. Reg. 51.
 655.

And the aforesaid *Anne*, who is within the age of twenty one years, by *R. C.* her guardian (in a special manner admitted by the court of our said sovereign Lady the now Queen) here comes and prays judgment of the aforesaid bill, because she saith, that she the aforesaid *Anne*, at the day of exhibiting the aforesaid bill, was, and now is within the age of twenty-one years, (that is to say) of the age of nineteen years, and no more; (*to wit*) at *London* aforesaid, at the parish and ward aforesaid; and that the aforesaid *A.* doth not prosecute her said bill against the said *A.* either by her next friend, or by her guardian. And this she is ready to verify; and therefore prayeth judgment of the aforesaid bill, and that the same may be quashed, *and so forth.*

Plea to the Jurisdiction of the Court.
 That the defendant is an Attorney of the Common Pleas.
 Lilly 9.

And the aforesaid *J.* in his proper person comes and says, that he was, at the day of exhibiting of the aforesaid bill of the aforesaid *Thomas*, and for divers years before, had been, and now is an attorney of the court of Common Bench of our said sovereign Lady the Queen,* attending divers affairs of several of her said majesty's liege people, in prosecuting and defending several suits for them as their attorney; and that the said *J.* and all other attornies of the said court of Common Bench, while they are so prosecuting and defending

* This plea will not be allowed now, unless pleaded as by the process under the seal of the same court to this plea annexed more fully appears, and the writ must be annexed to the plea. Lilly 9. in marg.

Abatement.

defending such affairs and suits of their clients, (according to the custom in the same court of Common Bench at *Westminster*, time out of mind hitherto used and approved of) ought not to be drawn or compelled against their wills to answer before any justices or officers of our said Lady the Queen, or other secular judges whatsoever (except before the justices of the said Common Bench at *Westminster*, upon any pleas, complaints, or demands (except only pleas of freehold, felonies and appeals.) And this he is ready to verify; and therefore prayeth judgment, whether this honourable court ought to take any cognizance of the plea aforesaid against him, *and so forth.*

FRAMPTON at the Suit of NOURSE.

And the aforesaid C. F. by J. L. his attorney, comes and prays A Writ of judgment of the aforesaid writ of *Scire Facias*, because he saith, that after the giving the aforesaid judgment in the aforesaid writ above-mentioned, that is to say, the sixteenth day of *November*, in the sixth year of the reign of our late sovereign Lord *William* the third, and Lady *Mary*, late King and Queen of *England*, at *Westminster* aforesaid, in the county aforesaid, he the said Ch. F. for reversing of the aforesaid judgment, had prosecuted out of the court of Chancery of the said late King and Queen, (then held at *Westminster* in the said county of *Middlesex*) their said late majesties writ for correcting errors of and upon the judgment aforesaid, in the said writ specified, directed to Sir *John Holt*, Knight, their said majesties Chief Justice, assigned to hold pleas in their court, before the said King and Queen themselves, and returnable on *Tuesday* the twenty-seventh day of the said *November*, then next following, in the court of Exchequer of the said late King and Queen, before the justices of the Common Bench, and the Barons of the Exchequer of the same King and Queen, (of the degree of the coise,) according to the form of the statute in that case made and provided; which said writ, after the issuing, and before the return thereof (to wit) the twentieth day of the same *November*, in the aforesaid sixth year of the reign of the said late King and Queen at *Westminster* aforesaid, in the said county of *Middlesex*, was delivered to the aforesaid Sir *John Holt*, Chief Justice aforesaid, to be executed in due form of law; which said Sir *John Holt*, Chief Justice aforesaid, hath not returned the aforesaid writ for correcting errors into the aforesaid Exchequer-chamber, and hath done nothing thereon; and this he is ready to verify; wherefore he prayeth judgment, if he the said Ch. ought to be compelled to answer to the aforesaid writ of *Scire Facias*, pending the aboveaid writ of error, *and so forth.*

And the aforesaid J. by J. A. his attorney, comes and defends himself against the said charge of force and injury, and saith, that

Error pending in the Exchequer Chamber pleaded to a *Scire Facias* why Execution ought not on the Judgment, &c.
Lilly 3.
Prac. Reg. 5. 6.
(P 12)
El. 27. 8.
By mistake the County.
Lilly 4.

Abatement.

the liberty of *Bury St. Edmond's* is, and time out of mind hath been in the county of *Suffolk*, and not in the county of *Middlesex*, as by the bill of the said *J. C.* above is supposed; and this he is ready to verify; wherefore he prayeth judgment of the aforesaid bill, and that the same may be quashed, *and so forth.*

Misnomer in the Stile of a Corporation. Lilly 4. Salk. 8. Prae. Reg. 199. And the said *B.* by *J. N.* his attorney, comes and defends himself against the force and injury above laid to his charge, and prayeth judgment of the aforesaid bill, because he saith, that the aforesaid plaintiffs are named and called the master and wardens, or guardians and commonalty of the mystery and art of Stationers of the city of *London*, and by that same name and title have always been named and called, without that, that they are named or called the master and wardens, or guardians of the mystery and art of Stationers of the city of *London* aforesaid, as by the said bill above is supposed; and this he is ready to verify; wherefore he prayeth judgment of the aforesaid bill, and that the said bill may be quashed, *and so forth.*

DRAYCOTT against CURZON.

Hill. 11 W. 3 Rot. 512.

Plea in Abatement that the Defendant is waived. Lut. 39. (P 13) And the aforesaid *N.* by *J. H.* his attorney, comes and says, that the aforesaid *Jane* is not entitled to an answer to her said demand, because she saith, that *T. N.* lately, (*to wit*) in *Trinity* term, in the ninth year of the reign of our sovereign Lord the King, that now is, impleaded the aforesaid *Jane*, by the name of, (*and so forth*) here in his majesty's court of Common Bench, of a plea of debt of three hundred and forty pounds upon demand; and that the aforesaid *Jane*, for that she did not come into the aforesaid court of Common Bench, there to make answer to the said *N.* thereto, according to the laws and customs of this kingdom of *England*, was put in *Exigent* to be waived in *London*; and for that reason afterwards, (*to wit*) on *Monday* next after the feast of the purification of the Blessed Virgin *Mary*, in the ninth year of the reign of his present majesty, in *London* aforesaid, the said *Jane* was, and now is, in due form of law, waived at the suit of the aforesaid *N.* in a plea of debt, as by the record and proceedings thereof here in this court more plainly may appear: And this he is ready to verify; wherefore, he prayeth judgment, if she the said *Jane* is entitled to have any answer made to her said demand; together with this, that he the said *N.* is ready to make appear, that the record aforesaid remains in its full strength, force and effect, neither revoked, reversed, pardoned, or annulled.

It was objected, that this plea ought to have been pleaded sub pede Sigilli, but it was answered, and so resolved by the court, that the outlawry being pleaded in the same court, it need not be pleaded sub pede Sigilli, but otherwise, if it had been pleaded in another court.

1 Lut. 40.

And

Abatement.

And the aforesaid *Robert*, by his attorney, comes and defends himself against the force and injury, and saith, that the aforesaid *Roger* is not entitled to an answer to his bill aforesaid, because he saith, that the aforesaid *Roger* is convicted of popish recusancy, and not long since, according to the form of the statute in that case made and provided, was convicted at a gaol-delivery of *Newgate*, of our late sovereign Lord *Charles* the second, late King of *England*, held for the county of *Middlesex* at Justice-hall in the suburbs of the said city, on *Tuesday* the thirteenth day of *April*, in the thirty-third year of the reign of the said late King, before Sir *William Dolben*, Knight, one of the Justices of his said late majesty, assigned to hold pleas before the said late King himself, Sir *Creswell Lewinz*, Knight, one of the Justices of the said late King of Common Bench, Sir *George Treby*, Knight, Recorder of the city of *London*, and others, their companions, then Justices of the said late King to deliver his gaol from prisoners, (being there at that time) upon an indictment against the said *Roger*, by the name of *Roger* Earl of *Castlemain*, late of the parish of *St. Martin in the Fields*, in the county of *Middlesex*, for that he on the twenty-third day of *December*, in the thirty-second year of the reign of the said late King *Charles* the second, was of the age of sixteen years and upwards, and did not repair to his parish church aforesaid, nor to any other church or place of common prayer, nor was there at the time of common prayer for two months next following the said twenty-third day of *December* in the thirty-second year aforesaid, but had forborn the same from the said twenty-third day of *December*, in the thirty-second year aforesaid, for the space of two months then next following, contrary to the tenor of the statute in such case made and provided, and contrary to the peace of the said late King, his crown and dignity; and the said *Roger* was convicted, which said conviction was continued and certified from the said court of gaol-delivery into his said late majesty's court of Exchequer at *Westminster*, in the county of *Middlesex*, according to the form of the statute in such case made and provided, and now remaineth in his present majesty's court of Exchequer of record, in its full strength, force and effect, not reversed or annulled, as by that record in the same court of Exchequer at *Westminster*, more fully may appear; and this he is ready to verify, and bringeth here into court the exemplification of the said conviction, sealed with the seal of the same court of Exchequer, which testifieth this to be true; and prayeth therefore that the same plaint may remain without a day, *and so forth.*

Plea in A-
batement,
because the
Plaintiff is
a Popish
Recusant
Convict.
Clift 3.

(P 14)

MORTON

Abatement.

MORTON and DAWSON, and others, Tertenants of YARWAY, at the Suit of JEFFRESON, Executor of JEFFRESON.

Pasch. 21 Car. 2. Rot. 291.

Plea in
abatement
that one of
the ter-ten-
nants is not
summoned.
2 Saund. 8.
1 Mod. 29.
1 Lev. 283.
1 Sid. 436.
2 Keb. 587.
1 Danv. 776.
1 Roll. 436.

And the aforesaid *J. M. H. W.* and *T. R.* by *J. W.* their attorney, and the aforesaid *R. B.* and *A. O.* by Sir *Cyril Wich*, Knight, their attorney, came here likewise at the same day, and thereupon the said *J. J.* the now plaintiff, prayed, that the aforesaid *J. H. T. R.* and *A.* might answer to the aforesaid writ, &c. And the aforesaid *J. H. T. R.* and *A.* say, that the aforesaid *J. J.* the now plaintiff, ought not to have his execution aforesaid against them the said *J. H. T. R.* and *A.* for the debt aforesaid, by virtue of the said recognizance, because they say that one *R. J.* long before the day of suing out the aforesaid writ, had, and always afterwards hitherto hath been, and now is, a tenant of one messuage, with the appurtenances, in the parish of *St. Mary Aldermanbury*, commonly called or known by the name of the *Axe-Inn*, of which said messuage the aforesaid *R. J.* deceased, named in the aforesaid writ, was seized in his demesne, as of fee, the aforesaid sixteenth day of *August*, in the twelfth year of the reign of his present Majesty, and that no writ of *sci. fa.* hath issued out of this court, directed to the Sheriffs of *London*, against the said *Robert* the said tertenant: And this they are ready to verify; and inasmuch as no writ of *Scire Facias* hath issued out of this court here, directed to the Sheriffs of *London*, they the said *J. H. T. R.* and *A.* pray judgment, if they ought to be compelled to answer to the aforesaid writ returned in form aforesaid, and so forth.

PLANT at the Suit of LITTLE and his Wife.

Mich. 2 Jac. 2. Rot. 767.

Plea in a-
batement,
that he is
an admini-
strator dur-
ing the
minority of
the infant.
1 Lut. 20.
N. L. 9.

And the aforesaid *Anne*, by *C. W.* her attorney, comes and prays judgment of the aforesaid writ, because she saith, that the aforesaid *Richard*, in the aforesaid declaration mentioned the thirty-first day of *July*, in the first year of the reign of our Sovereign Lord the King, that now is, at *Peterborough* aforesaid, made his last will and testament in writing, and thereby constituted and ordained one *Richard Plant*, son of the said *Richard*, executor of the same; and afterwards (to wit) the first day of *October*, in the first year aforesaid, died at *Peterborough* aforesaid; and after the death of the said *Richard Plant* the father, and before she administered any of his goods and chattels which were his at the time of his death, (P 15) (to wit) the third of *October*, in the first year aforesaid, at *Peterborough*

Abatement.

borough aforesaid, administration of all and singular the goods and chattels, rights and credits of the said *Richard Plant* the father, at the time of his death, by *William* by divine providence archbishop of *Canterbury*, primate and metropolitan of all *England*, was duly committed to the said *Anne*, with the testament of the said *Richard* annexed; and during the minority of the said *Richard* the son, and to his use and behoof, which *Richard Plant* the son is yet within the age of seventeen years, and is now actually alive, (to wit) at *Peterborough* aforesaid: And this she is ready to verify; wherefore inasmuch as the said *Archibald* and *Frances* have not sued out their writ against the said *Anne*, as administratrix of the goods and chattels which were of the said *Richard Plant* the father, at the time of his death, with the will of the said *Richard* annexed, during the minority of the said *Richard* the son: The said *Anne* prayeth judgment of the said writ, and that the said writ may be quashed: And bringeth here into court the letters of administration of the said archbishop, granted to the said *Anne* in form aforesaid, the date whereof is the day and year above said.

In the present case there was a *respondeas ouster* for want of the words; And this she is ready to verify, wherefore inasmuch, and so forth.

GLYNNE at the Suit of BRADLEY.

Trin. 2 Jac. 2. Rot. 341.

And the said *E. G.* by *J. O.* his attorney, comes and defends A plea that himself against the force and injury, and saith, That he the same the plaintiff *E. G.* ought not to be compelled to answer to the aforesaid writ, was excommunicated because he saith, that the aforesaid *J. B.* is, and at the time of suing by judges out the original writ aforesaid was, excommunicated by *William* delegates. *Trumber* and *Charles Farrot*, doctors of laws, judges, then delegates 1 Lut. 17. of the king, lawfully constituted (to wit) at the parish of *St. Martin* Noy 89. in the *Fields* aforesaid; upon which excommunication his Majesty's Keil. 96. a. writ of *Excommunicato Capiendo*, issued against the said *J. B.* directed to the sheriff of *Middlesex*; which said writ followeth in Lat. 177. these words; (*here recite the writ* :) And this he is ready the verify; 3 Lev. 334. wherefore the said *E.* prayeth judgment of the said writ issued 1 Lut 40. against him, together with this, that he the said *Edward* is ready to make it appear, that the said *J. B.* mentioned in the writ and declaration aforesaid, and the said *J. B.* in the *Excommunicato Capiendo* above-named are one and the same, and not different, persons.

There was a respondeas ouster in this case, because no certificate of the judges delegates was produced, nor was it pleaded sub pede sigilli; and another fault was, that the conclusion of the plea ought to have been, that the plea should remain within a day until, § and so forth,

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* In the original it is before not at. † Other not. § Co. Lit. Sect. 201.

Abatement.

forth, that is, until the plaintiff should have purchased his letters of absolution; at which time he may have a reattachment upon his original.

(P 16) TREMAIN at the Suit of FROXWIST, and others, Executors.

Mich. 22 Car. 2. Rot. 367.

Plea in abatement, that two of the executors (plaintiffs) are within the age of seventeen years. 2 Saund. 209.

And the aforesaid *J. T.* by *J. B.* his attorney, comes and defends himself against the charge of the force and injury, *(a)* and so forth, and prayeth judgment of the declaration aforesaid; because he saith, that the aforesaid *J. S.* and *E. S.* two of the plaintiffs in the declaration mentioned now are, and each of them is within the age of seventeen years, *(to wit)* each of them of the age of thirteen years, and no more, *(to wit)* at the parish of *St. Clements Danes*, in the county of *Middlesex*: And this he is ready to justify; *(b)* wherefore he prayeth judgment, and that the aforesaid bill may be quashed, and so forth.

The Countess of HUNTINGTON at the Suit of NAERS.

Mich. 4 Jac. 2. Rot. 313.

Plea in abatement, that there were but 14 days between the return of the teste, and return of the sci. fa. 2 Lut. 25.

And the aforesaid *Theophilus* and *Robert*, by *Charles Draper* their attorney, come and pray judgment of the aforesaid writ of *Sci. fa.* because they say, that the aforesaid writ, issued as above, beareth date at *Westminster* the twenty-third day of *October*, in the fourth year of the reign of our Sovereign Lord the now King; which said writ was returnable, and returned here on the morrow of *All Souls*, between which said twenty-third day of *October*, and the aforesaid morrow of *All Souls*, there were only fourteen days; and in that case the aforesaid writ of the said date returned here, is not sufficient in law to compel the aforesaid *T.* and *R.* to answer to the aforesaid plea: And this they are ready to verify by the said writ returned here at the said morrow of *All Souls*; wherefore they pray judgment of the said writ, and that the same may be quashed, and so forth.

SURBY at the Suit of GAWEN.

Pasch. 35 Car. 2. Rot. 1528.

An outlawry pleaded in abatement, sub pede Sigilli. 1 Lut. 6.

And now at this day, *(to wit)* on *Friday* next after the morrow of the *Holy Trinity*, in this same term, until which day the said *Robert* (saying to himself all and all manner of exceptions to the aforesaid bill) had leave to imparl to the same bill, and then to answer, and

(a) When.

(b) Verify.

Abatement.

so forth, before our Lord the King at *Westminster*, came as well the aforesaid *Carew Gawen*, by his attorney aforesaid, as the said *R.* by *Richard Townson* his attorney; and the same *Robert* defends himself against the force and injury, and saith, that he ought not to be compelled to answer to the aforesaid declaration of the said *Carew Gawen*; because he saith that one *T. Cloborn* formerly, that is to say in the term of *St. Hillary*, in the thirty-first year of the reign of his present Majesty, impleaded the aforesaid *Garew Gawen*, by the name of *Carew Gawen*, late of *London*, yeoman, in the court of common bench of our said Sovereign Lord the King, (the said court being then at *Westminster*) in the county of *Middlesex*, of a plea of trespass and assault; and the aforesaid *C. G.* inasmuch as he did not come into his said Majesty's court of common bench, to answer to the said *T. C.* thereof, according to the laws and customs of this kingdom of *England*, was put in *Exigent* to be outlawed in *London*, and on that occasion afterwards, (to wit) on *Monday* next after the feast of the Apostles *St. Philip* and *St. James*, in the thirty-second year of the reign of our said Sovereign Lord the King that now is, was outlawed at the suit of the said *Thomas Cloborn*, as by the records and proceedings thereof, now remaining in the said court of common bench of our said Sovereign Lord the King more fully may appear: Which said outlawry remains of record in its full force and effect, not reversed or annulled; and this he is ready to verify, where, and in what manner the court shall appoint; and the said *R. S.* brings here into court the writ of our said Sovereign Lord the King, of *Capias Utlagatum*, issuing out of his said Majesty's court of common bench, against the said *C. G.* under the seal of our said Sovereign Lord the King, for sealing his writs in the said court of common bench, directed to the sheriff of *Middlesex*, the tenor of which writ follows in these words, (to wit) [*here recite the writ*] whereupon the said *Robert* prays judgment, if he ought to be compelled to answer to the declaration aforesaid, (the said *Carew* being outlawed, as above) together with this, that the said *Robert* is likewise read to verify, that the aforesaid *C. G.* so as above outlawed, and the aforesaid *C. G.* the now plaintiff in the declaration above-mentioned, is one and the same, and are not different persons.

Note; *It seems there was a respondeas ouster awarded, and that because there was a full defence by the words, comes and defends the force and injury, when' &c. therefore I have here omitted the words when, &c. which denote such full defence.* Hardres 365.

Mich. 36 Car. 2. Rot. 301.

SEVILL at the Suit of WATFORD.

And the said *Elizabeth*, by *T. Freeman* her attorney, comes and plea in graves oyer of the said original writ; whereupon the aforesaid abatement, *Robert* hath above declared, and it is read to her in these words, that the

Abatement.

ed before
the letters
of admini-
stration.
Lut. 8.

(P 18)

(to wit) [*here recite the writ*] which being read and heard, she the said *Elizabeth* prays judgment of the aforesaid writ, because she avers, that the said *Daniel*, on the first day of *February*, in the said thirty-sixth year of the reign of our said Sovereign Lord the King, died intestate at *Chelmsford* aforesaid; and that on the twentieth day of *February*, in the thirty-sixth year aforesaid, and not before, Sir *Thomas Exton*, Knight, Doctor of Laws, Commissary and Sequestrator General, lawfully constituted, to the Reverend Father in CHRIST, *Henry*, by divine permission, Lord Bishop of *London*, in the divisions of *Essex* and *Hertsfordshire*, granted letters of administration to the said *Elizabeth*, of all the goods and chattels which were of the said *Daniel* at the time of his death, to be administered, (to wit) at *Chelmsford* aforesaid; and that she the said *Elizabeth*, by virtue of letters of administration aforesaid, is administratrix of all the goods and chattels which were of the said *Daniel*, at the time of his death, and not otherwise administered: And this she is ready to verify; wherefore she prayeth judgment of the said writ, and that the same may be quashed.

1 Lut. 9.
2 Mod. 65.

This plea upon a demurrer was held good, notwithstanding the objection, that the particular authority of the grantor of the letters of administration does not appear any otherwise than by the words, *commissary lawfully constituted*; and there was a difference taken between a peculiar jurisdiction and a commissary or chancellor of the bishop.

Plea in
abatement,
for misna-
ming his
name of
baptism.
Lut. 10.
Note; since
the act of
parliament
for annex-
ing an
affidavit to
the plea,
Quære if it
is not pro-
per to leave
these words
out.

And now at this day, (to wit) on *Thursday* next after the morrow of the Holy *Trinity*, *William Robins*, who was taken and arrested by the sheriff of *Norfolk*, by virtue of the aforesaid writ, by the name of *Robert Robins*, comes here in his proper person, and defends the force and injury, and pleads, that he ought not to be charged by force and virtue of that writ, *because he saith that he is not, nor can be understood to be the same person against whom the aforesaid A. brought his writ*; because he avers that he is named and called *William Robins*, and by that name and surname hath always from the time of his nativity hitherto been named and called. Without that, that he is named or called *Robert Robins*, or by that name and surname was ever called or known, as by the aforesaid writ of the said *J. B.* it is above supposed: And this he is ready to verify; wherefore he prays judgment of the said writ, and that he may be acquitted and discharged from the said writ, and may from the court here be dismissed at large, &c.

Lut. 10, 11.

Plea in
abatement,
that the re-

Note, That in this plea the defendant doth not demand judgment of the writ in the exordium thereof, but only in the conclusion; for it is not formal to demand judgment in the first part of the plea, if the matter pleaded is not apparent in the writ itself; and so it was held by *Dyer* and *Brown* in *Moor* 30.

And the aforesaid *Grace*, by *R. M.* her attorney, comes and prays oyer of the aforesaid original writ of the said *Samuel* and *Sarah*

Abatement.

Sarah; and it is read to her in these words; *James* the second, by stat^r was the grace of GOD, &c. [*here recite the writ*]; which being read alive at the time of the and heard, the said *Grace* prays judgment of the said writ, because sheavers, that the aforesaid *George*, her late husband, after the said writ purchased. sixth day of *November*, in the first year aforesaid (to wit) on the Lut. 13. thirtieth day of *November*, in the same year, was alive and in full health, (to wit) at *Otley* aforesaid —: And this she is ready to verify; wherefore she prays judgment of the said writ, and that the same may be quashed, &c.

There was a respondeas ouster here for this fault in the plea, that as the assumpsits in the declaration are supposed to be made at Bradford, the defendant ought to have pleaded that the testator was alive there, and not at Otley, which is alledged in the declaration only to be the place of commorancy of the defendant, and by this means the defendant would draw the venue of a transitory thing from the venue in the declaration. Dier 17. a. Lut. 14.

(P 19)

It is said in this case the death of the testator ought to have been traversed, and therefore, after the words, at *Bradford* aforesaid, insert thus, without that, that the aforesaid *George* late husband of the said *Grace*, died at *Bradford* aforesaid, in such manner and form as the said (plaintiff) doth above alledge. Vent. 213. 6 H. 7. 5. 6. 39 H. 6. 49. 19 H. 6. 11. 12.

And the aforesaid inhabitants of the said hundred of *B. W. hundred*, by *J. M.* their attorney, come and defend the force and in- in Hue and jury, and pray judgment of the writ aforesaid, because they plead, Cry, for that there is, and for so long a time as there is no remembrance of that the any man to the contrary, hath been in the said county of *Gloucester*, hundred in a hundred called the *seven hundreds of Cirencester*; and that during is parcel of all that time, the aforesaid hundred in the declaration aforesaid, another named *Bright Weldebarrow Hundred*, hath been, and still is the hundred. circuit of the town and lands in the county of *Gloucester*, commonly called *B. Hundred*, and parcel of the said Hundred, called the *Seven Hundreds*: Without that, that the aforesaid Hundred in the declaration aforesaid specified is, and during the aforesaid time hath been a Hundred of itself, as the aforesaid *W.* by his writ and declaration aforesaid above supposes: And this they are ready to verify; whereupon they pray judgment of the writ, and that the same may be quashed, &c.

Misnomer in the Sir-name.

W. William Pole of *London*, smith, who by the sheriffs of *London* was arrested by the name of *William Paul* of *London*, smith, personally appears and pleads, that he at the time of suing out the original writ of the said *A.* was, and always afterwards had been, and now is known and called by the name of *William Pole* of *London*, smith, Without that, that he, at the time of suing out of the same writ was, or at any time since hath, or before had been, or now is known or called by the name of *William Paul* of *London*, smith, as by the same writ is above supposed: And this he is ready to verify; wherefore he prayeth judgment of the writ, and that the same may be quashed, &c.

And

Abatement.

The defendants plead in abatement to the writ, that the plaintiff and another stranger are tenants in common, and the other not named in the writ.

And the said *A. B.* and *C. D.* by *J. M.* their attorney, come and defend the force and injury; and pray judgment of the writ aforesaid, because they aver that the said *J. K.* on the aforesaid fourteenth day of *August*, when the entry aforesaid is supposed to be made, had nothing in the manor aforesaid, with the appurtenances, unless in common, and undivided, with one *W. C.* Esq; which said *W.* is yet alive, and remains in perfect health, and not named in the writ aforesaid: And this they are ready to verify; whereupon they pray judgment of the said writ, and that the same may be quashed, &c.

Misnomer of the own wherein the entry and trespass is supposed to be pleaded in abatement.

(P 20)

And the said *A. B. C. D.* and *E. F.* by *J. M.* their attorney come and defend the force and injury, and all contempts, and whatsoever else they ought to defend, and pray judgment of the original writ of the (plaintiff) aforesaid, because that the aforesaid *T. L.* doth by the same writ suppose, that the aforesaid *A. B. C. D.* and *E. F.* entered into the manors aforesaid, with the appurtenances in *T. N.* &c. Whereas the said *A. B. C. D.* and *E. F.* do aver, that within the county of *N.* aforesaid, there is not, nor at the time of obtaining the aforesaid writ was, or ever had there been, any town, hamlet, or place known or called by the name of *Farthingale*. as by the writ above is supposed: And this, &c. (*as in the former*).

Misnomer of the addition.

And the aforesaid *A. B.* in his proper person comes, (or personally appears) and defends the force and injury, and all contempts, and whatsoever else laid to his charge, that he ought to defend, and pleads, that he is, and at the time of suing out the original writ of the said *C.* was of the society of *Clements-Inn*, in the parish of *St. Clements Danes*, without the bars, and a member of the *Middle Temple, London*, which said society is, and at the time of suing out the same writ was, and long before had been a certain society of men expert in the temporal laws, and practising the same: Without that, that he the said *A. B.* at the time of suing out the same writ, was *A. B.* of *London*, mercer, or by the name known or called, as by the said writ is above supposed; And this, &c. (*as in the former*).

Infancy.

And the said *R.* by *P. J.* his attorney, comes and prays judgment of the said bill, because he avers, That the said *R.* the now plaintiff, is within the age of 21 years (to wit) of the age of 18 years, and no more, at *Westminster* aforesaid; and that the said *R.* here in this court hath declared in the said action, by *F. G.* his attorney; whereas, by the law of the land, the said *R.* ought to have declared, by his next friend, (to be admitted by this court for that purpose): And this he is ready to verify; wherefore, inasmuch as the said *R.* being within age, hath in this court declared, in the said action, by *E. G.* his attorney, he the said *R.* prays judgment of the said bill, and that the same may be quashed, &c.

And

Abatement.

And the said *Cæsar*, by *H. C.* his attorney, comes and defends the force and injury, and craves oyer of the aforesaid bond ; and it is read to him in these words ; *Know all men by these presents, That I Cæsar Wood, of Ashwood, in the county of Berks, Knight, am held and firmly bound to William Sherrard and Company, of St. Bridget, alias St Brides, London, Mercers, in forty-six pounds of lawful money of Great Britain, to be paid to the said William Sherrard and Company, or their certain attorney, or their executors or administrators, to which payment I bind myself, &c. [and so go on with the bond]* : Which being read and heard, he the said *Cæsar* prays judgment of the said writ, because he avers, That *A. B.* and *C. D.* were then partners with the said *William*, in his trade of a mercer, at the parish of *St. Bridget, alias St. Brides, in London*, aforesaid, and that they are now actually alive : And this he is ready to verify ; wherefore, inasmuch as the said *A. B.* and *C. D.* are not named in the said declaration, he prays judgment of the said writ, and that the same may be quashed, &c.

A plea in abatement after oyer, that the plaintiff's partner is not named in the writ. Clift 8.

And the aforesaid *B.* by *T. K.* his attorney, comes and defends the force and injury, and prays judgment of the aforesaid writ ; because he saith, that the aforesaid *William*, after original writ aforesaid, was sued out, and before this day, (to wit) on the first day of *September*, in the second year aforesaid, died at *Dis* aforesaid : And this he is ready to verify ; wherefore he prayeth the judgment of this honourable court of the said writ, and that the said writ may be quashed, *and so forth.*

A plea in abatement, because the plaintiff died before the suing out of the writ. Clift 6.

And the aforesaid *D.* by *S. B.* his attorney, comes and prays the judgment of this honourable court of the writ aforesaid, and saith, that the aforesaid (plaintiff) at the aforesaid time, when the aforesaid trespass is supposed to be done, or at any time afterwards, or before, had nothing in the closes aforesaid, in which the said trespass is supposed to be done, unless jointly and for an undivided part, together with *A. B.* and *C. D.* which said *A. B.* and *C. D.* are now actually alive, (to wit) at *Swaffham* aforesaid : And this he is ready to verify ; wherefore inasmuch as the aforesaid *A. B.* and *C. D.* are not named in the said writ, he prayeth the judgment of this honourable court of the said writ, and that the said writ may be quashed, *and so forth.*

(P 21) That the plaintiff had nothing unless in a joint capacity. Clift 7.

And the aforesaid *N.* by *R. W.* his attorney, comes, *and so forth*, and prays an imparlance until the morrow of the *Holy Trinity*, and hath it, *and so forth* ; the same day is given to the aforesaid *J.* here, *and so forth*, at which day here came, as well the said *J.* as the aforesaid *N.* by their attorney as aforesaid ; and hereupon the same *J.* prays, that the aforesaid *N.* may answer to his writ and declaration aforesaid, *and so forth* ; and hereupon the aforesaid *N.* says, that the said *J.* is not entitled to have any answer to his said writ, because he saith, that the aforesaid *J.* after the last continuance of the plea aforesaid, (to wit) after the month of *Easter* last

An excommunication pleaded in abatement after the last continuance

past,

Abatement.

past, (from which day that action was continued here until this day, that is to say, in the morrow of the *Holy Trinity*) and before this day was, and still is, excommunicated, and he sheweth forth here in court the letters patents of the Reverend Father in God, *John*, by divine Providence, Bishop of *Bristol*, which testify the same in these words, *John* by the permission, and so forth, and recite all the *Letters of Excommunication verbatim*, and wherefore he prays that the action aforesaid may remain thereof without day until, and so forth.

For a messenger,
the Exchequer by his
privilege between
Nob and
Jennor,

And the aforesaid *A. B.* in his proper person, comes and says, that as well by the royal prerogative, as by an antient custom, according to the same, time out of mind used, persons sitting in the Exchequer of our sovereign Lord the King, their ministers and servants there attending the accounts and businesses of our said sovereign Lord the King, should not be drawn into plea otherwise than in the Exchequer aforesaid, as long as the said Exchequer should be open; and saith that he is, and from the day of the obtaining of the original writ of the said *G.* and *A.* was a servant, and one of the messengers attending on the Right Honourable Sir *Robert Walpole*, Knight of the most Noble Order of the Garter, Chancellor and Under-Treasurer of his said Majesty's court of Exchequer, at *Westminster*; and this he is ready to verify; wherefore he prayeth judgment of, and so forth.

(P 22)

SQUIB at the Suit of WENTWORTH.

Pasch. 13 W. 3. the Imparlance Rot Hill. 12. Rot. 677.

A plea in
abatement
by privilege
of the Ex-
chequer.
Lut. 44.
N. L. 18.
Hardres 365

And the aforesaid *A.* in his proper person, (saying to himself all and all manner of exceptions and advantages, as well to the jurisdiction of the court, as to the writ and declaration aforesaid) prays leave to imparl thereto till from the day of *Easter* in fifteen days; and he hath it granted, and so forth; the same day is given to the aforesaid *H.* here, and so forth, at which day comes as well the aforesaid *H.* by his attorney, as the aforesaid *A.* in his proper person; and the same *A.* saith, that as well by the royal prerogative, as by the antient custom concerning the same, used and approved of in the King's Exchequer, time out of mind, persons residing in the Exchequer of our sovereign Lord the King, and their officers and servants attending the accounts and businesses of our said sovereign Lord the King, should not be drawn into plea elsewhere than in the said court of Exchequer, so long as the same should be open; and the same *Arnold* further saith, that at the day of issuing of the aforesaid original writ of the said *H.* he was, and always afterwards hitherto hath been, and now is, a clerk of the *Nichils* of the said King's Exchequer, at *Westminster* in the county of *Middlesex*, (the same being then and now open) and that the same *Arnold*, by reason of his office, was then resident, and is now personally attending

Abatement.

tending thereon; and this he is ready to verifiy, and bringeth here into court a writ unopened of our said sovereign Lord the King, issuing out, and under the seal of the said court of Exchequer, in these words: *George the second, and so forth*; to all to whom these presents shall come, greeting: Whereas, as well by our royal prerogative, as by an antient custom concerning the same, used and approved of time out of mind, (*here recite the writ*) which said writ being read and heard, the same *Arnold* doth not apprehend that this honourable court will take any further cognizance of, or hold the aforesaid plea against him, *and so forth*.

SHORE at the Suit of DOBSON.

Upon which the said *L. D.* (saving to himself all and all manner of advantages, exceptions, and allegations to the plea aforesaid of the said *J. S. S. A.* and others) prays leave to imparle before our sovereign Lord the King, at *Westminster*, until *Wednesday* next, after fifteen days of *St. Hillary*, and the same is granted to him accordingly, (*a*) The same day is given to the parties aforesaid there, *and so forth*, at which day, before our said sovereign Lord the King, at *Westminster*, comes as well the aforesaid *J. D.* as the aforesaid *J. S.* by their said attornies; upon which the aforesaid *J. D.* excepting to himself as aforesaid, prays further leave to imparle thereto, (*b*) before our said sovereign Lord the King, at *Westminster*, until *Wednesday* next after the morrow of the Purification of the Blessed Virgin *Mary*, and he hath, as it was before, it granted to him, *and so forth*. The same day is given to the parties aforesaid there, *and so forth*, at which day, before our Sovereign Lord the King, at *Westminster*, comes as well the aforesaid *J. D.* as the aforesaid *J. S.* by their said Attornies. And the same *J. D.* saith, that after the last continuance of the aforesaid plea (*to wit*) after the said *Wednesday* next after the morrow of the purification of the Blessed Virgin *Mary*, (*to wit*) the tenth of *February*, one thousand six hundred and Eighty-nine, the aforesaid *D.* was, and now is absolved and discharged from the aforesaid sentence of excommunication, and restored to the communion of *Christ* and the Sacraments of the Church. And the same *J. D.* bringeth here into court the letters patent of *George Oxenden*, doctor of laws, principal official to the gracious court of *Canterbury*, lawfully constituted, testifying such absolution; which said letters patent follow in these words, (*to wit*) and here recite the letters patents.

And the aforesaid *H.* saith, that the said *Thomas* ought not to be admitted to plead his said plea of tender in the manner and form by way of above, because he saith, that the same *Henry* lately (*to wit*) in *Easter Term* last past, declared here in this court of the aforesaid plea, in manner and form aforesaid. And the aforesaid *T.* by the aforesaid

Lilly Ent. 9.

(P 23)

Replication
estoppel to
a tender af-
ter impar-
lance.

W. S. Clitt. 19.

(a) And so forth. (b) And so forth.

Abatement.

W. S. his said Attorney, then came and defended himself against the force and injury charged upon him, when, *and so forth*, and at the same time prayed leave to imparle thereto until this day, (*to wit*) on the morrow of the Holy Trinity, and such leave he had accordingly, *and so forth*, as by the record and proceedings now remaining here in this court of record may appear; and this he is ready to verify, wherefore he prays judgment, if the said *Thomas* ought to be admitted to plead his said plea of tender in the manner as above, *and so forth*.

In outlawry
pleaded in
Abatement
upon exi-
gent only,
without an
original and
other Pro-
cess.

5. Mod. 144

Holt, 3.

When to

plead in

Abatement

of the de-

claration.

2 Show.

443, 444.

And the aforesaid *William*, by *Samuel Allen*, his Attorney, comes and says, that the aforesaid *Ralph* is not entitled to an answer to his declaration aforesaid, because he saith, that another time, (*to wit*) the twelfth day of *February*, in the sixth year of the reign of the Sovereign Lord the King, that now is, before the then Justices of his said present Majesty here, that is to say, at *Westminster*, in the county of *Middlesex*, came one *H. S.* by the name of *H. S.* (*of such a place*) and by due process of law obtained and prosecuted his Majesty's writ of *Exigent*, against the aforesaid *Ralph*, directed to the then Sheriffs of *London*; which said writ commands the same then Sheriffs of *London*, that they should cause to be called the aforesaid *Ralph*, by the name of *Ralph*, late of *Chelmsford*, *and so forth*, otherwise call'd *W. H.* *and so forth*, from hustling to hustling, until he should be outlawed, according to the law and custom of this Kingdom of *Great Britain*, if he had not appeared; and if he had appeared, that then they should take him, and cause him to be safely kept, so that they might have his body before his said Majesty's Justices at *Westminster* aforesaid, on the morrow of the Holy Trinity, to answer to the aforesaid *H. S.* of a plea, that he should render to him sixty pounds, which he then owed to him, and unjustly detained, as it was asserted by the said *H. S.* the said Sheriff certified to his said Majesty's Justices of *Westminster* aforesaid, in eight days of the Purification of the Blessed Virgin *Mary* then last past, that the said *Ralph* was not to be found in their Bailiwick; for as much as the said Sheriffs had certified, by virtue of the said writ, the aforesaid Sheriffs, namely, *S. R.* Esq; and *John Pindar*, Esq; at the aforesaid morrow of the Holy Trinity, did return to his said Majesty's Justices at *Westminster* aforesaid; that at the aforesaid hustings, held at *Guildhall* of the City of *London*, (*such a Day and Year*) the aforesaid *Ralph* was the fifth time call'd, and did not appear; and at four hustings last preceding, the same *W.* had likewise been call'd, and had not appeared; and because at none of the same hustings he did appear, therefore he the aforesaid *Ralph* (*such a Day and Year aforesaid*) was outlaw'd. And the same *William* saith, that the aforesaid *R.* is still so outlaw'd, and that the same outlawry now remaineth in its force and effect, not reversed or annull'd; and this he is ready to verify by the record; and therefore he prays the judgment of this honourable court, whether the said *R.* for the reasons above, is entitled to have any answer from the said *W.* *and so forth*.

(P 24)

And

Abatement.

And the said *J. B.* by *J. L.* his Attorney comes and defends himself against the charge of the said force and injury, and prays judgment of the aforesaid Writ, because he saith, that he the said *John*, Defendant at the time of the suing out of the said original Writ, was, and ever since hath been, and now is a Baronet only, and not a Knight and Baronet, as the said *B.* above by his Writ supposeth, Without that, that the said *J.* now is, or at the day of the suing out the original Writ of the said *B.* was, or at any time since hath been a Knight and Baronet, as by the said Writ above is supposed : And this the said *J.* is ready to verify ; wherefore he prays Judgment of the said Writ, and that the same may be quash'd and so forth.

Abatement for that the Defendant is a Baronet, and not a Knight and Baronet.
5 Rod. 302

FULLER at the Suit of DOVEE.

And the aforesaid *James Fuller*, by *J. S.* his Attorney, comes and prays judgment of the aforesaid bill of *Robert Dovee*, because he says, that after the giving the judgment aforesaid, in the aforesaid declaration specified, and before the exhibiting the bill of the aforesaid *R. D.* (to wit) the twenty-ninth of *October*, in the seventh year of the reign of his present Majesty, the said *J. F.* in order to reverse the judgment aforesaid, prosecuted out of his present Majesty's High Court of Chancery, (that Court being then at *Westminster*) his Majesty's Writ for correcting errors in the record and proceedings, and also in giving the judgment aforesaid, directed to his aid Majesty's faithful and well-beloved Sir *John Holt*, Knight, then and now his Majesty's Chief Justice, assigned to hold pleas before the said King himself ; by which said Writ our said Sovereign Lord the King commanded his said Chief Justice, that if judgment should then be given therein, he should cause the record and proceedings of the plaint aforesaid, together with all things touching the same, to be removed before his justices of the Common Bench, and his Barons of the Exchequer, of the degree of the Coif, into his said Majesty's Exchequer Chamber at *Westminster*, on *Wednesday* the twenty-seventh day of *November*, that the said Justices of the Common Bench, and Barons might view and examine the record and proceedings aforesaid, and might further do what was to be done in that case, and what of right, according to the form of the statute in that case made and provided, ought to be done ; by virtue of which said Writ of Error the same Chief Justice afterwards (that is to say) on the said twenty-seventh day of *November*, transmitted the Record and proceeding of the Plaint and Judgment aforesaid, together with all things touching the same, before his said Majesty's Justices of the Common Bench, and Barons of the Exchequer, of the Degree of the Coif, in the said Exchequer Chamber at *Westminster* aforesaid ; and the Record and proceedings of the Judgment aforesaid are there yet remaining, and the aforesaid Writ of Error is yet depending

A Plea of a Writ of Error pending in the Exchequer Chamber, pleaded in Abatement to a Sci. fa. Lilly 11.

(P 25)

(a) Defends the force and injury, &c.

Readings and Observations, with an

depending undetermined in the said Court of Exchequer Chamber at *Westminster* aforesaid, and the Judgment is neither affirmed or reversed, as by the Record thereof now remaining in the said Court of Exchequer Chamber at *Westminster* aforesaid, before his said Majesty's Justices of Common Bench, and Barons aforesaid, may more fully appear: And this the said *James Fuller* is ready to verify, by the Record of the said Judgment and proceedings; wherefore he prays Judgment of the aforesaid Bill; and that the same may be quash'd.

Edward Northey.
John Brodrick.

Readings and Observations, with an Abridgment of the Cases in the Reports.

THE meaning of the word *Abatement*, when it relates to Writs, is the quashing of the Plaintiff's Writs from the *French* word *Abater*, to destroy or prostrate; so that by the matter of the Plea, the defendant shews to the Court, that the Plaintiff ought not to proceed on that Writ, but ought to entitle himself in a better manner before he can maintain his complaint against the Defendant.

Co. Lit.

134. b.

3 Bl. Com.

302.

And under this Signification, it is an *exception* alledg'd and made good in Law, and is as much as *exceptio dilatoria*, with the Civilians. *Britton*, cap. 51.

And as it is a *Dilatory Plea*, and in *Dilatione Celeris Justitiæ*, it is therefore not much favour'd in Law, and is generally not to be receiv'd after a general importance. But if the Defendant prays a special imparlance, and takes care to enter it in time, by which he saves to himself all advantages, as well to the Writ, as to the declaration, the Defendant may then plead within the time; for his pleading by the Plaintiff's rule, which without such special imparlance, he could not have done after four days from the return of the Writ, and these four days are allowed *ex gratia Curiae*, for the Defendant to plead to the Writ.

Cap. 16.

And by the Statute of 4 and 5 of *Queen Anne*, cap. 8. the Defendant shall not plead a matter of fact in Abatement, without an Affidavit of the truth of the Plea, by which it may appear to the Court, that the Contents of the Plea are true.

8 Mod. 43.

But if he pleads matter of record, he need not verify the truth of the Plea by Affidavit. *Modern Cases* 43.

And having said thus much of Abatement in general, the Cases in the books are distributed in the following manner.

First,

Abridgment of the Cases in the Reports.

First, What may be pleaded in Abatement.

Secondly, Of the Time and manner of pleading in Abatement.

Thirdly, Of the Judgment in Abatement.

First, What may be pleaded in Abatement.

1. The Defendant may plead to the Jurisdiction of the Court, submitting thereto, whether they have conuzance of the matter in question.

2. By disability of the Plaintiff, whereby he is not capable of maintaining his Writ against the Defendant. 3. By death, or somewhat happening pending the Writ. 4. By misnaming the Defendant, either in his name, addition, or habitation. 5. By variance between the Writ and the Count, or some Deed set forth, or some uncertainty or other defect of due form. 6. By the Defendant's being under the protection of the Law, as by being in Infant, Feme Covert, &c. 7. By the Plaintiff's misconceiving his action, or asserting a material allegation that is false, so that it appears of his own shewing, that he ought not to maintain his Writ in that Manner. 8. By having brought another action for the same Case. (27)

Of Pleading to the Jurisdiction of the Court.

1. In pleading to the jurisdiction of the Court, the Defendant must not commence his Plea, as if he was pleading in Bar, with the words *cometh and defendeth the force and injury when, &c.* for the words *when, &c.* signify when and where the Court will consider thereof, which is in affirmance of the jurisdiction of that Court. 2 *Show.* 443.

2. It is very certain, that in all Pleas in Abatement, it is better to say *that the Defendant comes and pleads, &c.* or that *he comes and defends the force and injury*, and pleads, &c. but the latter seems the better, according to *Co. 1. Inst.* 127. who there tells us, that it is necessary for the Defendant to plead that he comes and defends the force and injury, to make himself a party to the suit. So in *Lut.* 9. it is there said to that purpose.

3. The Plea of privilege is a Plea to the jurisdiction of the Court, tho' it doth not arise from the matter in variance, not being within the jurisdiction of the Court, but it submits to the Court, whether they ought to take conuzance of the action, or proceed against the Defendant in the Court, by reason of his being a person privileged by another Court, where he ought properly to be sued.

4. As an attorney of the Court of Common Pleas ought not to be sued elsewhere but in the Court of Common Pleas, unless the Plaintiff in the action in the King's Bench is likewise an attorney; for if so

Readings and Observations, with an

to the privilege of the Plaintiff of suing in the Court of King's Bench shall wave and render of no effect the Defendant's privilege, and so *vice versa*.

5. Nor shall an attorney have his privilege where he is necessarily join'd with another. 1 *Ven.* 299. *Salk.* 544. *Comb.* 465.

6. Nor where he is charg'd, or sues as Executor or Administrator, shall he have privilege. *Hob.* 177. *Salk.* 2. *Newton v. Rowland*, (a) Nor where he is Bail. 1. *Keb.* 735.

7. And if an action be brought in the King's Bench against an attorney of the Common Pleas, it is not enough for him to say that he is an attorney; for his being an attorney does not abate the plaintiff's bill, when once the action is attach'd in the King's Bench; but he must shew that he was an attorney at the time of the plaintiff's exhibiting the bill; for then it will appear to the Court the plaintiff might have sued the defendant there as a privileg'd person. 1 *Salk.* 1. *Pease v. Parsons*.

8. It is said by *Holt* in the case of *Duncombe v. Church*, *Comb.* 390. (b) that if a person, who hath a privilege of being sued in another Court, be in actual custody of the Marshal, he cannot plead his privilege; but otherwise where he is bail'd, and so only supposed in *Custodia Mariscalii*. 1 *Salk.* 1. *Jones v. Bodinner*, the same Point (c)

9. The Court of King's Bench will take notice of the privilege of their own officers; as where a *Filazer* of the King's Bench was arrested by a writ, he was discharg'd on common bail. *Brown's Case*, *Salk.* 544.

10. But where an attorney of the Common Pleas was sued by a bill in the King's Bench; upon a motion for his being discharg'd, the Court, *absente Holt*, denied it, and put him to plead his privilege. *Brown's Case*. *Salk.* 544.

11. No plea to the jurisdiction can be pleaded after an imparlance. *Comb.* 253. *Denham v. Plumpton*, in the Common Pleas.

12. Where a plea of privilege of the cinque ports was not allow'd to an action of debt upon a bond. *Godb.* 90. *Pl.* 102.

(P 28) 13. Where a plea of privilege was not allow'd, the action being brought against the defendant and his wife as executrix. *Godb.* 10. *Pole's Case*.

14. Where a plea of privilege of the University of Oxford was held ill. 1 *Brow.* 74. *Carol v. Paske*.

15. Where a plea of privilege of Parliament was held ill. 1 *Bro.* 91. *Jackson v. Kirton*.

16. It was held by the Court, that a *Foreign Attachment* cannot be regularly made upon a debt before it be due, and therefore to plead, that whereas one was indebted in a sum of money to be paid at *Michaelmas*, and it was attached before *Michaelmas*, tho' the judgment

(a) 12 *Mod.* 316. 1 *L. Raymond*, 533. S. C.

(b) *Salk.* 1. 12 *Mod.* 588. 1 *L. Raymond*. 93. S. C.

(c) 5 *Mod.* 310. 1 *L. Raymond*, 135. S. C.

Abridgment of the Cases in the Reports.

ment was not till afterwards, yet it was held to be void, because it was not due when attached. *Cro. Eliz.* 184. *Dalton v. Selly.* (a)

17. Where an attachment in *London* pleaded to action of debt upon a *mutuatus*, was not well pleaded. *Moor* 570. *Anon.*

18. After an action of debt was brought, the plaintiff attached in *London* the debt due to the defendant by another, and had a judgment to recover; it was adjudged, that this matter might be pleaded in bar to the action as to so much of the money. *Moor* 598. *May v. Middleton.* (b)

Of Pleading in Disability of the Plaintiff.

1. A writ does not totally abate for *outlawry* or *excommunication*, but it is only a temporary personal disability, and the judgment is, that the defendant *remaneat quousque.* 1 *Inst.* 128. b.

2. This plea likewise cannot be pleaded after an *imparlance.* 1 *Lut.* 19.

3. *Outlawry* must never be pleaded with a full defence. *Show.* 445.

4. Several *outlawries* pleaded in *abatement* is naught, for duplicity is ill in *abatement*, as well as in *bar.* 2 *Show.* 80.

5. How to plead that the party is an *alien.* 1 *Inst.* 129. a. *Mod. Rep.* 85, 405.

6. Where the defendant pleads that the plaintiff is an *Alien* in abatement of the writ, 'tis triable where the writ is brought, and the *replication* must conclude to the country; but otherwise it is said where it is pleaded in *bar*, that the plaintiff is an *Alien*, the *replication* must conclude with an *averment.* *Salk.* 2. *West v. Sutton, Comb.* 394. (c) *Texell v. Hooper,* (d) *e contra.* Where the defendant pleaded that the plaintiff was an *alien*, born at *Roan* in the kingdom of *France*, within the ligeance of the King of *France*; the plaintiff replies, that he is an *alien friend*, born at *Hamborough* within the ligeance of the Emperor, and traverseth that he was born at *Roan.* *Holt* inclined it was an ill traverse, and puts an ill issue. *Comb.* 212.

7. Of pleading recusancy in disability, *vide* the case of *Colvin v. Fletcher,* (e) *Modern cases in law and equity,* 1 *Part,* 43.

8. To an *assumpsit* for monies had and received, the defendant pleaded in abatement an *attainder*, and the plaintiff replied a pardon, and concluded in *bar petit judicium & dampna*; it was held a discontinuance. *Show.* 155.

9. That the plaintiff is a *Jew* is no disability, so long as the King permits them to trade. *Mich.* 36 *Car.* 2. *B. R.*

10. A person cannot plead in disability of himself, that he is *attainted* of treason. 1 *Leon.* 466.

11. Matter

(a) 1 *Roll.* 553. *Cro. El.* 713. *Cro. El.* 171.

(b) *Cro. El.* 342. *S. C.*

(c) *Holt.* 3. 2 *L. Raymond.* 583. *S. C.*

(d) 1 *L. Raymond.* 101, *S. C.* by the name of *Drimater v. Hooper.*

(e) 8 *Mod.* 43.

Readings and Observations, with an

11. Matter of disability that was pleadable to the action, shall not be pleaded to the *Scire facias* on the judgment. *Salk.* 2.

12. Where two executors sue, and one only proves the will, that is not a matter pleadable in abatement. *Salk.* 3. *Brookes v. Stroud.* (a).

Abatement by Death.

(P 30) Where actions are brought by the mayor and commonalty, they are abated by the death of the mayor. *Salk.* 398.

1. An action of debt is brought against two, one of the plaintiffs dies before verdict, the action is abated; but it is proper to plead it *puis darrein continuance*, tho' it may be assigned upon a writ of error as a matter of fact. *Comb.* 169. *Dove v. Martin.*

2. By the death of one of the plaintiffs in error the writ abates. *Comb.* 441. *Pennoyer v. Brace,* (b). But it ought to be suggested upon the roll before execution. *Comb.* 442.

3. Even at common law, before the act of 8 and 9 of King W. 3. cap. 10. sect. 7. where two jointenants were defendants, and one died, it did not abate the writ. 3 *Mod.* 249. *Cro. Jac.* 19. (c)

4. But otherwise where they were plaintiffs. *Ibm.*

5. Nor would the death of the husband, where husband and wife were prosecuted for words spoken by the wife, &c. abate the writ or action at common law. *Hard.* 151.

6. Nor would the writ in replevin against two abate, where one died after the issue joined. *Cro. Eliz.* 451, 574.

7. But in an action founded on a contract brought against two, and one died, the writ abated (tho' they were executors); but in an action of trespass (says the book) grounded upon a tort, there if one died, the writ did not abate. *Raym.* 131, 463.

8. So in *Yelv.* 208, 209. It is said, that in trespass, where one of the defendants died, pending the writ, it abated not, for the trespass is in itself several, and *non cul.* is their several pleas. But if judgment be had against them, and they brought a writ of error, and one died, it abated, the judgment has made that joint which was separate before.

9. By the act of 8 and 9 of K. W. it is enacted, 'That if there be two or more plaintiffs or defendants, and one or more shall die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the roll, the action shall proceed at the suit of such surviving plaintiff or plaintiffs, against such surviving defendant or defendants.'

10. Before this statute, where there was a verdict in ejectment against husband and wife, and the husband died before the day in bank,

(a) 7 *Mod.* 39.

(b) 5 *Mod.* 338. *Salk.* 319. *Holt.* 640. 8 *Mod.* 103. *Carth.* 404. 12 *Mod.* 430. S. C.

(c) *Capel v. Salton, Stat.*

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bank, yet judgment might be had against the wife; but if the wife died the writ abated. *Yelv.* 208. (a)

11. So that before the statute of 17 *Car.* 2. *cap.* 8. where the party died after the verdict, and before the judgment, the action abated; but by that statute the death of the party after the verdict, and before judgment, was aided. *Cro. Car.* 509. (b)

12. And this construction hath been put upon that statute, that if the defendant died after the commission-day of the assizes, and was dead, even while the cause was trying, yet the plea *puis darrein continuance* that the plaintiff died, ought not to be received; and the reason thereof seems to be, because the party had no time to plead it; for as the act of 17 *Car.* 2. aided the death of the party after the verdict, and before judgment; therefore inasmuch as the cause, tho' tried after the commission-day is supposed to be tried on that day, and the *posse* to be before the death. *Salk.* 6. And this point was likewise lately determined in the cause of *Keeble v. Hill* and others, tried before Mr. Justice Denton, at the Lent assizes in *Suffolk*, Anno 120. *Geo.* 1^{mi}.

13. If an action of debt be brought against two sheriffs for an escape, the death of the one does not abate the writ. *Hard.* 115.

By the Plaintiff's misconceiving his Action, or by making a false (P 29) Allegation.

1. And here 'tis necessary to be known, that where a man demands *two things*, and it appears by his own shewing, that he hath no action but for *one*, the writ shall not abate in the *whole*, but shall stand for that which is good; but where it appears, that tho' he cannot have this writ which he hath brought for *part*, but may have another, the writ shall abate in the *whole*. 11 *Rep.* 45. 2 *Rolls* 105. 1 *Saund.* 285.

2. As if an executor brings an action against another, upon the statute of *Ed.* 3. for breaking the plaintiff's close, and for money *asportatis in vita testatoris*, there inasmuch as it plainly appears he can have no action for the breaking the close; (it being *actio personalis & moritur cum persona*) the writ shall abate only for that part, and stand good for the remainder. 11 *H.* 4. 6. 11 *Co.* 45. b. 1 *Roll's Rep.* 11. (c)

3. Where husband and wife brought an action of trespass and assault, for the battery of the wife, and defendant pleaded a *licence for entering into the close* from the husband, and *not guilty*; as to the battery, the chief justice, and *Doderidge* were of opinion, that the plaintiff should have judgment, but *Haughton* and *Chamberlaine contra*; for that the wife had no cause of action for breaking the close of the husband; but this case being debated in *Serjeants-Inn* in *Chancery-lane*, the lord chief baron was of opinion, that the plaintiff should have judgment for that part that was good, and

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that

(a) *Spincer and Wood*, v *Countess of Rut.* (b) *Anon.* (c) *Childe* v *Durant.*

Readings and Observations, with an

that the writ should abate as to the rest; as in 9 E. 4. Pl. 51. where trespass was brought by husband and wife for the battery of them both; the jury found damages severally, and it was there held, that because the wife could not join with the husband in an action for the battery of the husband, for that part the writ shall abate, and for the battery of the wife it shall stand. Cro. Jac. 655. Buckley v. Hale.

4. So in *Detinue* of a box sealed with charters and writings concerning the title of lands; and the plaintiff shews in his count a title to three of the deeds and writings, that they concern his inheritance of land, of which the plaintiff and his wife were jointly seised, for which he alone could not have another action without joining his wife; there the writ shall stand good for the three, and abate for the fourth. 11 Co. 45. b. 9 H. 6. 54. a. 16 H. 7. 15. a.

5. So where a man brought a *formedon* of land, and an advowson, and it appeared that the *formedon* did not lie for the advowson, it shall stand good for the land. 11 Co. 45. b. 9 H. 7. 4. a. 16 H. 7. 5. a. 37 H. 6. 25. b.

6. So if a man avows of the taking a distress for diverse rents in arrear, and it appears of his own shewing, that part of the rents are not due, yet the avowry is good for the remainder, and shall not abate in the whole. Kiel. 31. b. 11 Co. 45. (a)

7. So if a man avows for rent, and a *nomine pænæ*, and it appears that he hath no cause to avow for one of them, the avowry shall abate only as to that part for which he had no cause to avow, and shall stand good as to the rest. 2 Roll's Abr. 434.

8. But 'tis to be observed, that where a man avows, and the plaintiff and defendant differ as to the *quantum* of the rent, and it appears that the party hath not entitled himself to such a rent, but to a less rent, there the avowant shall not have a return for any thing. Moo. 281. 1 Brownl. 186.

9. Where the avowry is for a rent-service due at several times, and it is one entire taking of cattle, and it appears by the avowry, that one of the days is not yet come, the whole avowry shall abate; but if the avowry be of taking several parcels of cattle for rent due at one time, and for taking other cattle for rent due at another day, and it appears that one of the days is not yet come, the avowry shall not abate in the whole, but only for that part that the rent appears not to be yet in arrear. 2 Roll's Abr. 434.

(P 30) 10. So if an action of debt be brought upon several bonds, where some are due, and some not, the plaintiff shall recover for those that are due. 5 Mod. 215. (b)

11 But if a man demands a debt of 20*l.* and confesses upon the pleadings, that he had no right to 10*l.* of it, the court *ex officio*,
or

(a) 44 E. 13. a. 48 E. 3. 46. & 5. a Dyer. 369, 370.

(b) 1 Saund. 284. 5. 1 Sid. 417. Gomb. 365. 8. P.

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or the party, defendant, or any other, as an *amicus curiæ* may abate the writ. *Hob.* 279.

12. So in debt for rent at several times, and the plaintiff declares for more than is in arrear, yet the plaintiff might well release the *surplus*, and take his judgment for the rest. 5 *Mod.* 214.

13. If the plaintiff doth in any action discover to the court any thing whereby it appears to the court that he had no cause when he began his suit, his writ shall abate.

14. As if it appears that administration was granted after the action brought, the writ abates. *Hob.* 245. *Bickford v. Bickford.*

15. So where the plaintiff brought a *quære impedit* against the archbishop of *York*, and *A. C.* for disturbing him in the presentation to the church of *L.* and the bishop pleads, that *J. S.* the incumbent died the 10th day of *January*, in the 12th year of the king; and that the church remained vacant, and he presented *J. S.* for lapse, and claimed nothing but as ordinary; and the incumbent pleads and confesses the plaintiff's title, but pleads the collation of him by the bishop; the plaintiff by his replication shews, that after the death of *J. S.* and before 1st day of *January*, in the said 12th year, (*to wit.*) the 29th day of *May*, 1615, he presented *J. D.* to the church, and the bishop refused him; and that afterwards the bishop, (*viz.*) the 23d day of *December*, collated *A. C.* to the church; now upon his own shewing, the plaintiff abates his writ, because the action was brought before the cause of action, which arose from the collation, and there could be no disturbance before the action brought. *Hob.* 197, 198.

16. *J. S.* the defendant covenanted with *J. D.* the plaintiff, that *J. S.* would pay the plaintiff, within three months after request, all such sums of money as the defendant's son, being the plaintiff's apprentice should imbeizil from him; the son does imbeizil, &c. But on the trial it appeared, that the three months were not lapsed after the request, before the action brought, and the writ abated. *Hob.* 217.

17. Where a man has a right to an action, and the same is well begun, and part of the demand is determined by act of law, and the like action may be had for the residue, there the writ shall not abate; but where by determination of part, the like action will not lie for the residue, there the writ shall abate. *As for example*; If an action of waste be brought against the tenant for the life of another, and pending the writ the life drops, the writ shall not abate, but the plaintiff shall recover damages only; because, if the life had dropt before the action brought, the lessor might have an action of waste for the damages. *Co. Lit.* 285. a.

18. So if an *ejectment* had been brought, and the term had incurred pending the suit, yet the plaintiff might proceed for his damages. *Co. Lit.* 285. a.

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19. Yet if *tenant* for another man's life brings an *assize*, and the life had dropt pending the writ, the writ shall abate, because no *assize* can be maintainable for damages only. *Co. Lit.* 285. *a.*

20. So if an action of *waste* be brought by husband and wife in remainder in special tail and pending the suit; the wife dies without issue, the writ shall abate, because every kind of *waste* must be *ad exheredationem*. *Co. Lit.* 285. *a.*

21. If an action of annuity be brought, and the annuity determines pending the suit, the writ faileth for ever, because no such action can be maintainable for the arrearages only, but for the annuity and arrearages. *Co. Lit.* 385. *a.*

(P 31) 22. If a parson sues out a writ, and then resigns, the writ will abate; but if he be promoted again to the same benefice before the return, it is otherwise. And if one sues out a writ, and after is created a bishop, the writ abates not, because it is the act of law, but resignation is the act of the party. *Owen* 30, 31.

23. If *four* commit a *trespass*, which is in its nature joint and several, yet if the plaintiff will bring his action against one only, and declare that he with the other three did the *trespass*, his action shall abate. *Hob.* 199.

But if he had brought his action against one alone, and the defendant had *pleaded*, that he with others did the *trespass*, and that the plaintiff had released to the other; and the plaintiff denied the release, whereby he doth in a manner confess, that the others were joint trespassers, yet the action shall not abate. *Ibm.*

24. If *A.* brings an action of *debt* upon a *bond* against *B.* who pleads that the bond was made upon a condition, that the defendant should perform the award of two, and that they two, and a third made an award, this is naught; but if the plaintiff does alledge an award by the two, or by the three, and alledges not also a breach, whereby it may appear to the court that he had a cause of action, he shall never have judgment. *Hob.* 199.

25. If there be two *tenants* in *common*, and one only brings an action where they ought to join; if this appears by the plaintiff's own shewing, the defendant may take advantage of it upon the general issue, but if it does not appear, then it ought to be pleaded in abatement. *Latch* 153.

Of Pleas in Abatement, as to Misnomer of Name, Addition or Degree.

1. The defendant pleads in abatement that his name is *Jermy*, and not *Jermyn*, and pleads thus, *Et prædictus J. Jermyn venit, &c.* this is naught by confessing the name the plaintiff uses; it should have been *Et super hoc veni J. Jermy Et dicit quod ipse est eadem persona que arrestat' fuit per nomen Jermyn Et dic' &c.* *Hill.* 3. *W. & M. Rot.* 291. *Show. Rep.* 394.

2. The

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2. The defendant pleads in abatement, that he was baptized by the name of *John*, and by that name always was called and known, *absque hoc*, that his name is *Benjamin* tho' the first part of the plea is but an inducement, yet *that* and the *traverse* are both material, because one may be baptized by the name of *A.* and be confirmed by the name of *B.* 6 *Mod.* 115. 1 *Salk.* 6. (a)

3. And where a defendant comes in *gratis*, and pleads by the name alledged by the plaintiff, he^e is estopped to alledge any thing against it. *Stile* 440.

4. Where one is misnamed in a bond, the writ must be brought against him by the name as in the bond. *Dyer* 279.

5. If *A.* gives a bond by the name of *B.* and he is accordingly sued by the name of *B.* he may plead *misnomer*, and the other may reply, that he made the bond by the name of *B.* and estop him by demanding judgment, if against his own deed he shall be admitted to say his name is *A.* and then he may *rejoin* and say, that he made no such deed, and this he must do without *oyer*; for if he prays *oyer*, he admits his name to be *B.* *Salk.* 7. *Linch v. Hooke.* (b)

6. If the addition of the defendant's quality and dwelling, be omitted in any original writ in a personal action, appeal or indictment, where exigent may be awarded, the writ shall abate, but it shall not abate for surplusage in the additions. 1 *Hen.* 5. c. 5.

7. A *Feme Covert*, after an arrest, giving bail-bond by a wrong name, may plead the misnomer, and she is not estopped by the bail-bond. 1 *Salk.* 7. *Linch v. Hooke.*

8. The name of *Earl*, if omitted, abates the writ. *Davis Rep.* 60. a. But if a person is created an Earl pending the action, bill or suit, it shall not abate. 1 *Ed.* 6. cap. 2. Sect. 3. But there must be an entry on the roll, with a *post ultimam continuationem, scilicet*, that such a day and year, the king by his letters patents, &c. (P 32) setting it forth with a *profert in cur' & quod prædicti defendans non dedicit.*

9. If a *Baronet* is sued by the addition of a knight and baroner, the writ shall abate. 1 *Ven.* 154. (c)

10. To the plea of *misnomer*, the plaintiff may reply the defendant was known by the name in the writ. 1 *Salk.* 6.

By Coverture.

1. If an original be filed against a *feme sole*, and before the return she marries, you may declare against her without taking notice of her husband; for her intermarriage is no abatement of the writ in fact, but only makes it abateable. *Comb.* 449. 1 *Roll's Rep.* 53.

Variance,

(a) *Walden v. Holman.*

(b) 6 *Mod.* 225. S. C.

(c) 2 *Keb.* 824. S. C.

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Variance.

1. If the declaration assigns waste in a town not mentioned in the original writ, the writ of waste abates. *Hob.* 38.
2. What variance between a bond and the declaration abates the writ, *see Hob.* 116. *Walter v. Pigot*, *Mo.* 645. 2 *Rolls* 147. 1 *Cro.* 895. *Hob.* 18, 19, 20.
3. Where the writ shall not abate for variance from the register, so that it be equivalent. *Hob.* 1, 51, 52.
4. If a writ of second deliverance varies from the declaration in replevin, it shall abate the writ. *Cro. Jac.* 424. *Newman v. Moore.*

Another Action for the same thing pleaded.

1. It is reported in *Comb.* 144. in the case of *Rawlinson* against *Oriel* and others, that both defendants may join in pleading a recovery against one of them. *Carthew* 96. *The same Case.*
2. Where the defendant pleads another action depending in the same court, and the plaintiff demands oyer of the record, and 'tis not given him in a convenient time, the plea ought not to be received, but the plaintiff may sign his judgment. *Carthew* 454. *Theobald v. Long.* (a)
3. And where an action was brought for a battery and imprisonment, and the defendant pleaded another action depending in abatement; the plaintiff replied, *quod non habetur tale recordum*, & petit quod recordum illud inspiciatur, without giving the liberty to the defendant to rejoin, *quod habetur tale recordum*; and it was held a good replication. *Creamer v. Wickett*, *Carthew*, 517. (b)
4. If a *quare impedit* be purchased against two, depending a former *quare impedit* against one of them, tho' the plaintiff declares upon a new disturbance, yet the writ shall abate, for the effect of the suit is still for the same thing, (*viz.*) the presentation, and there are still two writs depending against one man. *Hob.* 137.
But the plaintiff may have as many writs as he will against several persons. *Ibm.*
5. In an action of *trover* and *conversion*, it is a good plea that the plaintiff had an action depending for the same conversion in *banco regis*, or any writ that comprehends certainty, but where there is no certainty till after the count it is no plea. 5 *Co.* 62.
6. In an assize of *darrein presentment*, it is a good plea in abatement to say, that the plaintiff had brought a *quare impedit* for the same avoidance. *Hob.* 4.
7. If an action of debt, &c. be depending in an inferior court, a bill for the same debt may be brought in any court in *Westminster*. 5 *Co.* 62.

8. In

(a) *Holt.* 554. *S. P.* 1 *L. Raym.* 347. *S. C.*

(b) 1 *Ld. Raymd.* 55.

(c) 1 *Show.* 75. *Holt.* 1.

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8. In an action of debt, &c. another action depending in the courts of *Westminster* for the same matter, is a good plea in abatement; but a plea of an action in an inferior court is not good, unless judgment be given. 5 Co. 68.

9. It hath been said that a writ of error depending in the Exchequer, is a good plea in abatement to an action of debt, upon a judgment in the King's Bench. 5 Mod. 68. Comb. 199. But the contrary hath been since held to be law. 1 Show. 146. Cumb. 199. Lut. 600. *Denton v. Evans, Carthew* 136. 1 Mod. 121. 2 Ven. 261. 1 Sid. 236, 253. Palmer 187, 303. Ray. 100. 1 Lev. 153. 2 Mod. 194. (P 33)

In some Cases the Court may and will, Ex Officio, abate the Writ.

1. In a *formedon*, the tenant pleaded *jointenancy* by fine with J. S. the demandant did aver the tenant sole tenant; and upon that issue was taken, and found for the demandant; held that the writ ought to abate *ex officio*, without the exception of the party; for the jointenancy being pleaded by fine, ought to have abated the writ, and no averment by the demandant against a fine, which is matter of record, ought to have been received. And at common law, if the tenant had pleaded *jointenancy* by deed, the writ should abate without any averment, but that was remedied by 34 Ed. 1. However jointenancy by fine remains as it was at common law, for he hath punishment enough by his plea in that case, if it should be false, inasmuch as he hath by way of conclusion given the moiety of the land in demand to him, with whom he hath pleaded the jointenancy. 2 Lev. 62. *Harker v. Moreland*.

2. A levies a fine to the use of B. in tail, remainder to A. then A. levies a fine of the reversion to his own use, B. dies without issue, A. brings a *formedon* in reverter, and alledges, that the land should revert to him *secundum formam* of the first gift, whereas his title is by the new fine; tho' the tenant has pleaded other matter, yet he may as an *Amicus Cur'* inform the court, and they may *ex Officio* abate it. Hob. 280, 281.

3. A *Scire facias* was sued out against an administrator, *teste* 12th of Feb. defendant demanded *Oyer* of the administration, which bore *Teste* the 26th of May afterwards, and then pleaded that matter in abatement after imparlance; and altho' it is not pleadable after a general imparlance, yet the court upon a demurrer *ex officio* abated the writ. 2 Lev. 197. *Harker v. Moreland*.

4. If a *quare impedit* be brought against parson and ordinary, and not against the patron, it ought to have been pleaded in abatement, but the court *ex officio*, it is said, cannot abate the writ. 2 Roll's Rep. 239.

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It may not be improper to speak somewhat of Journeys Accounts.

1. A writ of *journeys accounts* is where a former writ abated for false *Latin*, variance of form, or other defect of the declaration, and 'tis *quasi* a continuance from the former writ, in which the plaintiff must recite, that the former writ abated. (a)

2. *A. and B. jointenants*, *A.* suffers *C.* to occupy with him, *B.* brings partition against *A.* and *C.* which abates, because *C.* had nothing; he may have another *per journeys account*. 2 *Cro.* 218. *Bro. Journeys.* 1, 2, 3.

3. *J. S.* makes *A.* his executor till *B.* comes to the age of twenty-one years; *A.* brings debt, pending which *B.* comes of age, he may continue the writ by *journeys*, otherwise had *A.* been appointed administrator *durante*, &c.

4. If it abates by *jointenancy*, a death of one partner, or one jointenant, new writ may be had by *journeys*, &c. *Bro. Journeys* 11, 12, 19.

5. If a man brings an action against an executor who is outlawed, and the judgment reversed, he may immediately bring a new action by *journeys accounts*, and it will be deemed a continuance of the same action. *Winch* 82. 6 *Co.* 10, 11.

6. Where the new writ differed from the old in the county, and damages; and see within what time it must be brought. *V. Lut.* 296.

7. A writ cannot be by *journeys accounts*, by or against an executor or administrator, but only where the same parties were parties to the writ, as if one plaintiff or defendant dies. *Lut.* 260. *Cro. Eliz.* 174.

(P 34) Secondly, Of the Time and Manner of Pleading in Abatement.

1. If a declaration be delivered against one in custody, he has the whole term to plead in abatement. *Salk.* 515.

2. What time the defendant hath to plead in abatement. *Comb.* 251. *Holditch v. Aynsworth.*

3. There is usually four days time to plead after a *respondeas ouster*. *Comb.* 19.

4. In pleading in abatement these rules are to be observed in concluding the plea.

5. If a plea is pleaded to the jurisdiction of the court, it ought to conclude with a prayer of judgment in this manner, *viz. The said defendant prays judgment, whether the court will take any further cognizance of the said plea.*

If it be pleaded to the person of the plaintiff, there it must be *if he ought to be compelled to answer.*

If it be pleaded to the writ, then the plea concludes with the prayer of judgment of the writ, and that the writ may be quashed.

When

(a) 6 *Co.* 10, b.

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When it is to the action of the writ, there he should shew that the party ought not to have that writ, but by the matter of his plea should intimate to him how he should have a better. *Latch* 178.

6. *Respondere non debet* is a proper beginning to a plea to the jurisdiction of the court, but a plea of *ne unques executor*, ought to begin with *petit judic' de bill*. 5 *Mod.* 146, 132 133. 1 *Saund.* 283. 2 *Saund.* 97, 189, 190, 339. *Lut.* 44. *Show.* 4.

7. In a replication to a plea in abatement where matter of fact is pleaded, the plaintiff may pray his damages; and if upon issue verdict be found for him he shall have final judgment; but where matter of law is pleaded, the plaintiff must only maintain his writ. 3 *Anne*, in *B. R.*

8. If one pleads matter of abatement, and concludes in bar *et petit judicium si actionem habere debet*, tho' he begins in abatement, and the matter be also in abatement, yet the conclusion being in bar, makes it a bar; and the reason is, because you admit the writ by concluding specially against the action. 18 *H. 6.* 27. 36 *H. 6.* 18. 22 *H. 6.* 536. 1 *Show.* 4.

9. If a man pleads matter in bar, and concludes in *abatement*, it shall be taken for a plea in *bar*, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action, and therefore the Court will take the plea to be in bar. 37 *H. 6.* 24. 36. *H. 6.* 24. 2 *Mod.* 6.

10. The Chief Justice delivered the opinion of the Court, that a plea was good in bar, tho' pleaded in abatement, and the defendant hath his election to plead, either in bar or abatement; the nature of a plea in abatement, is to entitle the plaintiff to a better writ; but here the defendant shews that the plaintiff hath no cause of action, and so it shall be taken to be no bar; and it is of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar or abatement. 2 *Roll Rep.* 64. *Salkill v. Shilton.* (a)

11. The defendant pleaded that he was an attorney of the Common Pleas, and that he ought not to be sued elsewhere without consent; the plaintiff shews that he had his consent, but did not say where; the replication was held ill. 1 *Salk.* 4.

12. But where the defendant pleaded that he was an attorney of the Court of Common Pleas, but did not say where; it is said that *Holt* held it good. *Salk.* 545.

13. And it is there said that an attorney of the Common Pleas need not plead his privilege *sub pede figilli*, to an action brought against him in the King's Bench. *Salk.* 545. *Scawen v. Garrett.*

14. And this difference is taken by my Lord *Holt*, that where an attorney pleads his privilege with a writ *sub pede figilli*, it is conclusive and cannot be denied; but where it is pleaded merely by plea, there

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there may go a *Certiorari* to have it certified whether the defendant be an attorney or not. *Dillon v. Harper*, Salk. 545.

15. *Venit & dicit* is sufficient in a plea to the jurisdiction, and so is *dicat* only without *Venit*, if it appears he is in *custodia*. 2 Salk. 543. *Kirkham v. Wheely* (a)

16. The defendant pleads *quod suscepit ordinem Militarem & jam Miles existit*, but the plea was ill, because it was not said he was a Knight *tempore exhibitionis billæ*. Salk. 6. *Lett v. Mills*; but not saying where *suscepit ordinem Militarem*, was held well enough; and see the same point, as to the first relating to an attorney, in title *plea to the jurisdiction*. (b)

17. After a bail-bond forfeited, the defendant cannot plead in abatement to the original action. Salk. 519.

18. Where *jointenancy* is pleaded in abatement, the life of the other jointenant must be averred. Salk. 32.

19. Where want of addition of the word *junior*, as a *designatio personæ* was not held ill, without shewing that the *senior* was in *custodia Marefcalli*, for any matter that distinguishes the persons renders that addition unnecessary. Salk. 7.

20. In *replevin*, the taking in another place is a good plea in abatement, but if the conclusion of the plea is with a prayer of a return, it is ill. Salk. 3.

21. In *replevin*, property in a stranger might be pleaded, either in bar or abatement; and where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry. But where the plea in abatement is to the point of the action, as property is, the defendant shall not have a return without an avowry; for whether the property be in the defendant or a stranger, the defendant ought to have a return, because he had the possession which was illegally taken from him by the *replevin*, when the plaintiff had a right. Salk. 94. *Butcher v. Porter*, *Carthow* 243, 244.

22. The court will not abate the plaintiff's writ or bill, if not prayed by a proper conclusion. Salk. 298.

23. Where the defendant pleads in abatement a matter of fact, and the plaintiff replies and traverses the manner of the plea, he may conclude either judgment, *si actio, &c.* or *quod respondeas ouster*; for if the defendant joins issue it will be final; if he demurrs it will be that he answer over; but if the joinder in demurrer concludes in bar, 'tis said to be ill. *Comb.* 479. *Bennet v. Hull*. (c)

(a) 1 Show. 400 Salk. 94. 2 Ld. Raym. 1017. S. C.

(b) Post. 37 and seq

(c) In *Carth* 433 and *Holt*. 557. (*Bonner v. Hill*) in 1 Ld. Raym. 338. *Bonner v. Hull*. S. C.

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24. Where an action of debt is brought upon a bond for the payment at several days, and one of the days is not yet come, the defendant cannot plead payment at two of the days, and conclude in abatement, but must plead it in bar. *Comb.* 483. *Owen v. Bulkley.* (d)

25. Where judgment is, that the defendant shall *answer over* on the first plea in abatement, it is an *Estoppel* to plead the same matter again in abatement. *Comb.* 465.

26. A man shall not assign that for error, which he might have pleaded in abatement; and therefore, if an infant with two others make conuzance in replevin by an attorney, and the plaintiff is nonsuit, the plaintiff cannot assign for error that the infant appeared by attorney, but he might have pleaded it in abatement of the conuzance; and if a feme covert brings an action and recovers, the defendant shall not assign coverture for error. *Carthew.* 124. *Coan v. Bowles, & al.* (e)

27. Administrator and not executor was pleaded without a traverse, and held well. *Carthew* 363.

28. To conclude *unde petit judicium si ad billam predict. respondere compelli debeat*, is proper only in nonability of the person of the plaintiff or to the jurisdiction of the Court, and not to a plea of being administrator and not executor. *Carthew* 364. (f) (P 37)

29. After an imparlance, ancient demesne may be pleaded in abatement, and no other dilatory plea. *Latch* 83.

30. No advantage can be taken to a bad declaration upon a demurrer to a dilatory plea. *Carthew* 172. *Lut.* 1592.

31. That an attorney may plead his privilege so long as he continues upon the roll. *Lut.* 1666.

32. *Q.* of a replication to a plea of another action depending, whether good or no, there being three judges against one, of opinion that it was good. *Lut.* 1644.

33. Where an issue was joined by one defendant, and the other demurs upon the issue being found for the plaintiff, the writ shall abate as to both. *Hob.* 250.

Thirdly, Of the judgment in Abatement.

1. If issue be taken upon a plea to the writ, judgment against the defendant is *peremptory*; but if there be a demurrer, it is then only that the plaintiff *answer over*. *Latch.* 374. *Yeko.* 12. *Allen* 66.

2. Upon a judgment in *waste* for the damages recovered, the defendant demurs partly in abatement, and partly in bar, the Court shall give judgment in *chief*. *Show.* 255.

3. If

(d) 1 *Ld. Raym.* 346. (e) 4 *Mod.* 7. 1 *Show.* 13. 165. *Salk.* 93. 2015 *Comb.* 100. 12 *Mod.* 1. *Holt.* 358.

(f) *Bowers v. Cook.* 1. *Salk.* 297. by Name Powers v. Clerk.

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3. If the defendant imparls to a day in a personal action, and does not appear at that day, judgment *final* shall be given against him; for the default is *peremptory* as to him, and there is no process to bring him into Court again, 38 H. 6. 33. so in debt, if the defendant pleads in abatement to the writ, to which the plaintiff imparls, and at the day given, the defendant makes default, judgment *final* is upon the default, tho' the plea was only in abatement. 10 E. 4. 7. *Mod. Cases* 5. (g)

4. A writ of error was brought upon a judgment in a *formedon in remainder*, where the tenant pleaded *infancy*, and that the remainder descended to him, and therefore prays that the parol may demur by reason of his age; and the demandant denies that the remainder descended to him, upon which issue was joined, and it was found for the demandant, and judgment *final*; and the Court held, that notwithstanding the infancy, yet as issue had been joined upon a dilatory plea, and tried by the country, the judgment ought to be *peremptory*. 1 *Lev.* 163.

5. Where matter of abatement is pleaded in bar, there shall be judgment in chief. 1 *Lev.* 291.

6. Upon a writ of error of a judgment given in the common pleas for abating a writ in a real action, the judgment is reversed in the King's Bench, the King's Bench shall proceed upon the original writ, and shall give such judgment as the Court of Common Pleas ought to have done, if the writ had not been abated. 2 *Saund.* 256.

7. Upon a writ of error returned into the exchequer before the record transcribed, one of the plaintiffs in error dies, upon which the plaintiff in the action takes out an execution, but it was superseded, for he should have acquainted the Court with the death of the party; and the Lord Chief Justice Holt said, the sheriff might have a special return to the writ. *Brace v. Pennoyer*, 5 *Mod.* 338. *Carth.* 404. 1 *Salk.* 319. *Comb.* 441.

8. Where in an action of account as *receiver*, the writ shall abate as to that part where the defendant ought to have been charged as *bailiff*, and judgment shall stand good for the rest. 4 *Leon.* 39.

9. Where the plaintiff shall not have judgment on a *scire facias*, the plea not being adjudged *peremptory*. 2 *Shorr.* 42.

For other cases as to abatement of writs, *vide* Appendix. post. 505.

References to Precedents in Abatement.

REFERENCES to other Precedents, in Abatement.

Pleas to the Jurisdiction.

TH A T the action accrued out of the jurisdiction of the Marshalsea Court. 3 Instr. Cl. Fo. 14. 2 Mod. Intr. Fo. 1.

That the lands are pleadable in the County Palatine of Chester. Rob. Entr. 1. 3 Instr. Cl. 14. Brown's Vade Mecum 473. And a demurrer, for that this plea is after imparlance. 2 Mod. Intr. 1.

That the lands are held in ancient demesne; replication, that they are held in fee at common law. Br. Red. 504. 3 Instr. Cl. 9. 2 Mod. Intr. 2. What lands are pleadable in a Manor Court, and not elsewhere. Br. Red. 504. 3 Instr. Cl. 8. Tho. 2. 2 Mod. Intr. 2.

That the place where, is within the cinque ports. Br. R. 475. 3 Instr. Cl. 7. 2 Mod. Intr. 2.

By Misnomer of the Person.

Of the christian name. Tho. 1. Pl. Gen. 8. 3 Instr. Cl. 68, 70. 2 Mod. Intr. 12. Clif. 16. Cl. Ass. 12. Reg. Plac. 289. Raftall 276.

Of surname. 1 Bro. 3 Tho. 1. 3 Instr. Cl. 67. Reg. Plac. 288. Cl. Man. 435. Han. 119. Raftall 49, 50, 54, 108, 296, 334, 516, 616.

For Incertainty and Misnomer of the Place.

Plea by two, as to one, for not distinguishing him from J. C. the elder, there being two of the same name; as to the other noncomorancy. 3 Instr. Cl. 68. Raft. 496.

In the name of the town. 3 Instr. Cl. 72. Cl. Ass. 4. 1 Bro. 2. 2 Mod. Intr. 341, 343. Raft. 610, 47, 108, 900, 301. 615.

That the deed was made to the father deceased, and not to the son of the same name. Clif. 7.

Mistaking of the place where the trespass supposed, that it is in another vill. Reg. Pl. 287. Replication and issue. Cl. Ass. 3.

Of the parish in appeal of murder. Br. Red. 2 Reg. Plac. 284.

In trespass. That the certainty of the number of the cattle is not contained in the writ. 1 Bro. 1.

By

References to Precedents in Abatement.

By Nullity.

No such person. Pl. gen. 8. 3 Instr. Cl. 77. 2 Mod. Intr. 13. Raft. 49, 92.

No such vill. 3 Instr. 77. Reg. Pl. 287. Raft. 108, 298, 334, 353.

Mistaking of the Place of Abode.

That he was commorant at B. and traverse, that he was commorant at C. 1 Bro. 6. 3 Instr. Cl. 81. Cl. Aff. 13. Han. 268. Raft. 108, 195, 299, 126, 108, 300, 298.

For Mistaking the Degree or Addition.

That the defendant is a Yeoman and not a gentleman. Pl. Gen. 4.

Gentleman and not a broker. Ro. 91. Raft. 108, 570, 298.

That the plaintiff lost her dignity by marriage. 1 Bro. 3.

That the defendants have no additions as executors. 1 Bro. 3. 3 Instr. Cl. 50.

Chapman and not a husbandman. 3 Instr. Cl. 80.

Butcher and not a husbandman. 2 Mod. Instr. 12.

That the plaintiff was a knight at the time of suing out the writ. Cl. Aff. 1. 3 Instr. Cl. 81. Reg. Pl. 287.

That the defendant is a gentleman, and not a doctor of physick. Clif. 16.

That the defendant is a baronet, and not a knight and baronet. 1 Ven. 154. Clif. 17.

By mistaking the Vill or Parish.

In appeal, that there is such a parish called by the name of the parish of St. James, within the Liberty of Westminster, but not St. James's Westminster. 1 Bro. 2 Bro. R 2. 2 Mod. Intr. 13.

In dower, that part of the lands demanded lie in M. and not in E. or W. Replication, that M. is the hamlet of E. Ro. Entr. 285.

(P 38) Formedon, that part of the lands lie in G. and traverse, that they lie in H. and issue thereupon. 2 Bro. 165.

In trespass at R. and C. that C. is without the vill of R. parcel of the same. Cl. Aff. 3. 13.

By defect of addition in the vill or hamlet. Clif. 15, 16.

By Death.

Because the plaintiff died after the last continuance. Thomp. 3. with their replication and issue. 1 Bro. 3. 8. Pl. Gen. 7. Br. R. 199. Cl. Aff. 6, 7. 3 Instr. Cl. 64. Reg. Pl. 293 Raft. 108. The

References to Precedents in Abatement.

The like in the King's Bench Thomp. 3, 171. In debt against two administrators, that one died after the last continuance. Br. R. 175.

The death of one of the defendants, the other prays an imparlance, and pleads it. Han. 112.

That the plaintiff died before the suing out of the writ, with the replication, that he is alive. 3 Intr. Cl. 65. Clif. 6.

In a scire facias, that one plaintiff died. Replication, that he is alive. Off. Br. 345.

In appeal of murder, that the elder brother of the appellant was alive, and died soon after the issuing out of the same. Han. 258.

In trespass against A. and B. Not guilty pleaded by B. and A. died after suing out the writ. Replication, that he was alive. Cl. Ass. 10. 2 Mod. Intr. 15.

In quare impedit by husband and wife, that she died after the last continuance. Wi. Intr. 771.

In formedon, after oyer and the continuance, and a new writ by Journey's Accounts. Pl. Gen. 3.

Coverture.

In the plaintiff. 1 Bro. 7. Br. R. 181, 203, 204. 3 Instr. Cl. 30. 2 Mod. Intr. 7. Clif. 8. 14. Rob. Entr. 3. Pl. Gen. 4. 134. Thomp. 1. 1 Bro. 63. Raft. 138, 326.

Not lawfully married. Cl. Ass. 78. 3 Intr. Cl. 60. Hanf. 103. That the plaintiff, after the last continuance of the writ of scire facias, was married. Special demurrer, and judgment, that the defendant should answer over. Vid. 77.

In the defendant. Hanf. 104. Cl. Ass. 5, 14. 3 Instr. Cl. 60, 61, 62. Reg. Pl. 290. Pl. Gen. 4 Cl. Ma. 435. 2 Mo. Intr. 7. Clif. 5. Cl. Ass. 81. Br. R. 203.

By Things done after the Original sued out.

Ejectment, that the plaintiff entered into the lands after the last continuance. Pl. Gen. 1. Herne 7. Raft. 30.

Dower, that the demandant, after verdict and before judgment, entered into the lands. Pl. Gen. 1. 3 Instr. Cl. 96. Raft. 234.

Debt upon a bond, that the plaintiff, after the original sued out, made acquittance to him of part of the debt. Replication, that the defendant was obliged in another writing, and the plaintiff made an acquittance for that rejoinder, that there was an acquittance for part of the debt above demanded, and issue. Pl. Gen. 5, 320. 3 Instr. Cl. 94, 95. Raft. 11.

That plaintiff released to defendant after the writ issued. Pl. Gen. 5. 6. 1 Bro. 8. Tho. 2. Han. 102. Ro. Intr. 3. R. Pl. 293. Cl. Ass. 10.

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References to Precedents in Abatement.

That it evidently appeared by the declaration, that the demise was made after exhibiting the will. Tho. 2.

Defendant pleaded, that an award was made after the last continuance. Replication, that no award was made, and issue. Br. 181.

Writ of error in the Exchequer Chamber, to quash the writ. Clif. 13.

By Action ill founded.

That the plaintiff issued his original writ before the day of payment. 1 Bro. 1, 3. Pl. Gen. 246. 3 Instr. Cl. 52. Br. 259.

Writ issued before the day of appearance, pleaded to the bailbond. Clif. 18.

In trespass, that the plaintiff brought his writ before the trespass made. 1 Bro. 4. 3 Instr. Cl. 54. 2 Mod. Intr. 15. Clif. 19.

That no writ of Ca. Sa. was sued out before the Sci. Fa. against the bail. 3 Instr. Cl. 53.

That the writ issued before the cause of action. Clif. 10, 19.

In debt, by Baron and feme. Plea, that the plaintiffs brought their writ before the marriage celebrated. Replication, that they were married before issuing out of original. 1 Bro. 4.

(P 50) The like against one executor. That the testator made the defendant and one B. executors, which said B. is alive, and not named in the writ. Replication, that the testator did not constitute B. his executor, and issue. 1 Bro. 4. Tho. 1. 3 Instr. Cl. 46, 47, 78. Pl. Gen. 11, 12. 2 Mo. Intr. 18. Han. 102. Ro. Entr. 229.

That administration was granted to another, and not to him. Cl. Ass. 105.

That A. made T. and W. executors, and traverse that A. died intestate. Tho. 140. 3 Instr. Cl. 47. Bro. V. M. 465.

That the testator made the plaintiff and another executors, and traverse, that the plaintiff is sole executor, and replication. Bro. Red. 200.

That the testator made the defendant and another executors, not named in the writ. Replication, that the executor not named, died before the original sued out. Bro. Red. 199. Clif. 15.

That administration was granted to the defendant, and another who is alive and not named in the bill. Tho. 1. Pl. Gen. 337. 2 Mo. Intr. 18.

Administrator, and not executor. Replication, that he is executor, with a traverse. Pl. Gen. 2, 3, 6. Clif. 15, 16. 2 Ven. 178. The like with a traverse. Tho. 221.

That the testator was alive at the day of exhibiting the bill, and replication. Pl. Gen. 336. Han. 107.

That the Bond was made to two, and that it doth not appear that one is dead. 1 Bro. 4.

That the bill is in case, and ought to be in account. 2 Mo. Intr. 18.

That the plaintiff is within age, and ought to sue by his guardian

References to Precedents in Abatement.

or next friend, and not by attorney. 1 Bro. 2. Br. R. 475. 3 * (P * 39)
Inst. Cl. 55.

Debt against an heir, that there is another who was heir and alive,
against whom the action ought to have been brought. Tho. 9. 3
Instr. Cl. 48.

That there is a party named in the writ, who did not seal the in-
denture. Clif. 4.

That there is a partner not named in the writ. Clif. 8.

In a Formedon in Reverter a husband and wife, that the Reverter
is alledged to the wife only, which ought to have been to the hus-
band and wife. 3 Instr. Cl. 105.

The like in Descender, that the plaintiff named in the writ, as son
and heir of H. only, whereas it ought to be son and heir of H. and
A. his wife, which the plaintiff acknowledges. 1 Bro. 170.

Quare impedit upon the statute of simony, abated, for that the
patron was not named in the writ with the defendant. Demurrer
thereupon, and noli prosequi by the Attorney General. Bro. R. 410.
The like 3 Lev. Rep. 15. Clif. 23.

Because the action is placed in a wrong county, Clif. 6. that the
property is in the defendant. 107.

In Replevin by husband and wife, that the property in the goods
was the husband's only. 3 Instr. Cl. 55. Cl. Ass. 9. Reg. Pl.
292. 2 Mo. Intr. 17.

In Formedon in Descender, that it ought to be in remainder.
Hern 463.

By another Action depending.

In debt. 1 Br. 6.

That the defendant was impleaded in the Mayor's court in the
same cause of action. Rob. Entr. 222.

The heir at law being sued upon the bond of the ancestor, pleads,
that the plaintiff had an action depending against him as executor.
3 Lev. 25. Lev. Entr. 54, 55.

Plea of another action depending in false imprisonment. Br. 220.
2 Mod. Intr. 14. The like in trespass. Clif. 89, 22. The like
upon the statute of the fifth of Elizabeth, for exercising a trade
contrary to the statute, with a replication, that it was had by fraud,
with a rejoinder and issue upon the fraud. Tho. 6.

The like plea, with replication of no such record, and issue
thereon, and a day given to bring in the record. Tho. 148. Vid.
187.

To an information, that the informer exhibited a former infor-
mation for the same offence. Bro. Red. 437.

Quare impedit that the Plaintiff brought another writ against
the Bishop only, and that the same is depending, with replication
and demurrer. Wi. Entr. 783.

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References to Precedents in Abatement.

As to part, that he oweth nothing ; as to the other part, an action depending. 3 Instr. Cl. 97.

For default in the writ.

That it is contrary to the form of the register. 1 Bro 1. 3 Instr. Cl. 51, 57. Ro. Entr. 1.

For material words omitted. Cl. Aff. 2, 14. 1 Br. 1. Han. 103. Reg. Pl. 291. 2 Mo. Intr. 12. Ash. 6. Herne 6.

That there are but fourteen days between the teste and return. 3 Instr. Cl. 59. Ash 6

That the wife is put before the husband, acknowledgment of the mistake, and hath a writ by journeys accounts. Cl. Aff. 12. Reg. Pl. 286. Herne 7.

That it doth not appear, that the plaintiff hath found pledges. Ro. Entr. 1.

That there other tertendants not named in the writ. 2 Ven. 103. Co. Entr. 624

(P *40) * To a venire facias at the nisi prius, that it was directed to the sheriff of S. whereas the issue ought to have been tried by the men of the City of L. and a new venire facias awarded. 1 Bro 2.

For insufficiency in the return of the original. 2 Mo. Intr. 12.

That the writ of scire facias is not directed to the sheriff of the county where the record of the judgment is. Clif. 11.

For Variance.

Between the writ and declaration. 3 Instr. Cl. 39, 45. Reg. Pl. 277. 2 Mo. Intr. 9. Ash. 4.

Between the bond and the writ. 3 Instr. Cl. 39, 100. Cl. Aff. 2, 3. Reg. Pl. 278, 281. Ash. 3, 4. Raft. 459.

Between the plaint and the declaration. Clif. 20.

Between the writ and the will. Cl. Aff. 14. Reg. Pl. 280. 3 Instr. Cl. 40, 42. 2 Mo. Intr. 11. Ash. 5.

Between the writ and the register. Reg. Pl. 276. 2 Mo. Intr. 10.

Between the plaint in the inferior court and the declaration above. Br. Red. 1, 2. Reg. Pl. 282.

Between the original and letters of administration. 3 Instr. Cl. 44. 2 Mo. Intr. 11. Ash. 4.

By privilege or dignity of the person of the defendant.

That the defendant is a baron of the cinque ports, where, and not elsewhere he ought not to be impleaded by letters patent, Edward 1. and confirmed by Eliz. Ro. Entr 199. Cl. Aff. 10.

That the defendant is a Tally-cutter and a Receiver of the Exchequer. Tho. 3.

References to Precedents in Abatement.

Plea for a Deputy Serjeant at arms, Treasurer of the Exchequer, impleaded in the King's Bench. Tho. 4.

The same for a clerk of the exchequer after a special imparlance. Tho. 118.

Privilege by marshall of the King's Bench, by an action brought by an attorney in the common pleas. 2 Bro. 60.

By a senior Filazer of the common pleas impleaded in the King's Bench. Tho. 4.

By an attorney of the common pleas. 2 Mo. Intr. 7. Tho. 4, 3. Instr. Cl. 32. Sile Br. V. M. 496. 3 Instr. Cl. Sile 32. 2 Mo. Intr. 8.

The like for a chancery clerk impleaded in the King's Bench. Tho. 3. Sile 3 Instr. Cl. 30. Sile Br. V. M. 497, 500.

By a servant of a serjeant's clerk in chancery, in the King's Bench. Ro. Entr. 210.

Defendant is a serjeant at law. Cl. Aff. 5.

Privilege as servant to the house of lords. Vid. 93.

By the disability of the person of the plaintiff.

That the plaintiff is an alien enemy. Replication, that he was born under the allegiance of his Majesty. 3 Instr. Cl. 15. 2 Mo. Intr. 3. Clif. 4. Cl. Aff. 113.

That the plaintiff is excommunicate. 1 Bro. 5. Tho. 9. Vid. 25. Pl. Gen. 9. bis Br. R. 100. 3 Instr. Cl. 17. 2 Mo. Intr. 3. Clif. 13. Pl. Gen. 10. Replication, that the plaintiff is absolved from sentence of excommunication and judgment for the plaintiff, that the defendant should answer over. Pl. Gen. 10. and from 72 to 76.

That the plaintiff is a popish recusant convict, and hath not conformed. 1 Bro. 5. Tho. 185. Br. R. 466. 3 Instr. Cl. 19. 2 Mo. Intr. 5. Clif. 3, 11. Wi. Entr. 752.

Outlawry on an action upon the case after judgment. Replication, no such record. Rejoinder, that there is such a record, and the defendant at the day failed in his record. 1 Bro. 7. 2 Mo. Intr. 4, 5. Tho. 8, 9. Ro. Entr. 214. Clif. 14, 3.

That the plaintiff was fore-judged. Clif. 5, 9. 3 Instr. Cl. 22, 24, 27.

By privilege of land.

That the place where, &c. is held of the king, as of his manor of B. which is of ancient demesne. Replication, that it is pleadable at common law. 1 Bro. 2.

That the place where, &c. and all other lands in that manor, are held of the king and pleadable in the manor court, and not elsewhere. Replication, that the place where, &c. is pleadable at common law. Tho. 2. 3 Instr. Cl. 8. Han. 103.

References to Precedents in Abatement.

That the lands are held of the manor of B. which is of ancient demesne. Tho. 2. Mo. Intr. 249. Ro. Entr. 58, 101. Vet. Int. 91.

That the land is within the manor of C. and that it is held of E. as of the manor of N. which is likewise within the manor of C. which is held of the prince, and in parcel of the county palatine of Chester; and that all lands, as well in the county of Chester as out-held of the county of Chester, are pleadable before the justices there, and not elsewhere. Demurrer thereto. Ro. Entr. 1. Instr. Cl. 14. and Bro. Vade Mecum 473. Ra. 419. Vet. Intr. 33.

(P *41) * In trespass, that the place where, &c. is within the cinque ports. 3 Instr. Cl. 7. Br. R. 475.

In partition, that lands held of the manor of B. which is of ancient demesne, and pleadable in the court of the manor by writ of right. Replication, that the grandfather of the plaintiff held the tenements of the King, as of his castle of W. in free socage, and traverse, that it was held of that manor. Wi. 1. Entr. 517.

Trespass, that the lands are ancient demesne. Replication, that a fine was levied to R. rejoinder, that the close in the declaration is not contained in the fine. Tho. 347. Br. R. 504. Ro. Entr. 250. Tho. 348.

That the house and close were parcel of the manor of D. and are held of the same manor, which is of ancient demesne. 3 Instr. Cl. 9. Hern. 351.

By Non-Summons.

Upon a scire facias against the Tertenants, who pleaded in abatement, that one of the tenants was not summoned, upon which a scire facias is awarded against him, and upon the scire facias returned a Respondeas Ouster awarded. 2 Saund. 8. 2 Ventris 103.

The like to a return of Grand Cape. 3. Instr. Cl. 84, 93.

By Non-Tenure.

In dower. 1 Bro. 205. 2 Mo. Intr. 16. Ra. Entr. 231, 232.

The like to part. Ro. Entr. 24. 1 Bro. 202.

The like in Formedon. 2 Bro. 164. Ra. Entr. 440, 364. Co. Entr. 329. Ash. 325.

In a writ of right, non-tenure pleaded. Replication, that he is tenant. Issue, with verdict, issue and judgment thereon, and a writ of seisin awarded. 1 Bro. 314.

The like plea to part. The like replication, and plaintiff puts himself upon the great assize. 1 Bro. 313. Ra. Entr. 449.

In formedon non-tenure, non-tenure pleaded to part of the lands and rent. Ra. Entr. 417.

In assize, non-tenure pleaded and if, &c. the plaintiff never was seized, and if, &c. no Tort, &c. Ro. Entr. 128.

For

References to Precedents in Abatement.

For that the defendant was not tenant of the freehold at the time of the writ. 3 Infr. Cl. 83. Replication and issue, the like in Cl. Aff. 8. Bro. V. M. 459.

To a return of grand cape, two pleaded non-tenure to the writ, the third pleaded, that he is sole tenant, and was never summoned. 3 Infr. Cl. 84. Ra. Entr. 281.

Defendant pleaded, that the tenements descended to his father, who is yet seized. 3 Infr. Cl. 86.

In formedon non-tenure pleaded in abatement after imparlance; plaintiff replies, that the tenant, after suing out of the original, enfeoffed divers persons unknown by fraud, and that he could have no notice of the persons against whom the writ of formedon in disceder issued; that the defendant continually received the issues and profits, by which, and by force of the statute, he ought to be adjudged tenant, being pignor of the profits. Demurrer thereto. 3 Lev. Rep. 52. Ra. Entr. 363.

By jointenancy, tenancy in common, and non-tenure.

That the plaintiff hath nothing in the lands in which, &c. unless in common with W. Replication, by new assignment. Tho. 12. Han. 103. 3 Infr. Cl. 87.

That the plaintiff, at the time of trespass, had nothing, unless together, and for an undivided part with J. W. 3 Infr. Cl. 89. Replication, and new assignment. Clif. 23.

That the plaintiff had nothing in the messuage newly assigned, unless in common with P. Replication, that the plaintiff is sole seized; and traverse, that P. had any thing. 1 Bro. 8. Han. 103.

Formedon against C. and D. C. pleaded jointenancy with D. and one S. of the gift of D. D. pleads non-tenure. Replication, that C. and D. are tenants in common, and traverse that S. hath any thing. Ra. Entr. 362.

In dower jointenancy with the wife to part, non-tenure to the residue. 3 Infr. Cl. 92. 2 Mo. Intr. 16. Ro. Entr. 267. Ra. Ent. 233. Vet. Ent. 114. Ash. 10.

In assize, disclaimer by one, some other defendants plead, that they held jointly with R. and H. by a deed of J. brought into court. Replication, that the defendants are sole tenants; and traverse, that they have any thing. Scire facias to maintain the tenure jointly. Pl. Gen. 120. Ro. Entr. 134. Ra. Ent. 66. Vet. Ent. 143.

By Sole-Tenure.

In formedon. Ra. Ent. 364, 367.

Dower against two. Each pleads that he holds in severalty as to * (P * 42) part, and to the residue they plead severally non-tenure. Ro. Ent. 267.

In

Account

In assize by one, no wrong by the other, that he is sole tenant, and traverse that others have any thing in the tenements. And if, &c. no wrong. 2 Bro. 42. 3 Instr. Cl. 93.

In Grand Cape. Ra. Ent. 248, 271, 282.

Petit cape. Ra. Ent. 270, 271.

In a writ of entry. Ra. Ent. 272, 273.

In a juris utrum. Ra. Ent. 419.

Demurrer and estoppel in abatement.

Estoppel. That the tender ought not to be pleaded after a special imparlance. Clif. 17, 19, 203, 18, 21.

The like, because the variance was pleaded after imparlance. Cl. 20. Tho. 2, 18. 1 Bro. 8.

A C C O U N T.

PIERCE. against CLARKE.

Michaelmas 11 of King William 3. Roll 787. C. B.

In account
against bai-
liff. Lut 58.
N. L. 24.

OTHERWISE, as it appeareth in *Hillary* term, in the ninth year of the reign of his present Majesty, in the *roll*, No. 1659, it is thus contained: *Suffex*, (to wit) *John Clarke*, late of the city of *Chichester*, in the county aforesaid, gentleman, was summoned to answer to *Richard Pierce*, gentleman, of a plea, that he should render to him his reasonable account during the time he was bailiff to the said *Richard*, in the parish of *Bosham*, and so forth; and thereupon the said *Richard*, by *John Wakeford* his attorney, saith, that whereas the said *J. C.* had been bailiff to the said *R.* at the parish of *Bosham* aforesaid, from the first day of *May* in the third year of the reign of his present Majesty, until the tenth of *October* then next following, and during all that time had the care and management of one hundred and thirty-two bushels of wheat, to the value of twenty-five pounds, of the said *Richard*, to merchandize and make profit thereof for, and to render a reasonable account thereof to the said *R.* whenever he should be thereto requested; nevertheless the said *John*, though often requested, hath not yet rendered an account thereof to the said *R.* but hitherto hath altogether refused so to do; wherefore he saith that he is thereby injured, and hath sustained damages to the value of thirty pounds, and therefore brought this suit, and so forth.

And

Account.

And the said *John Clarke*, by *James Vavasor* his attorney, comes Bar that he and defends himself against the force and injury (a). and the da- hath fully mages, and whatsoever else he ought to defend, when this court will accounted. be pleased to take the same into consideration, and saith, that the aforesaid *R.* ought not to have his action thereof against him, because he saith, that after the time that the said *J.* was supposed to be bailiff to the said *R. C.* and to have had the care (b) of the aforesaid one hundred and * thirty-two bushels of wheat, (to wit) the (P*43) eleventh day of *October*, in the seventh year of the reign of his said present Majesty, at the parish of *Bosham* aforesaid, he the said *J.* fully accounted with the said *R.* of and concerning the said bushels of wheat, for the said time he was so bailiff, as above : And this he is ready to verify ; and therefore he prayeth judgment if the said *Richard* ought to have his said action aforesaid against him, and so forth.

And the said *Richard* saith, That for any thing above by the said *John* in pleading alledged, he the said *Richard* ought not to be pre- Replication cluded from having his action thereof against him ; because he that he hath saith, that the said *John* hath not accounted with the aforesaid not ac- *Richard* for the said one hundred and thirty-two bushels of wheat, counted, as the said *John* hath above in pleading alledged : And this he pray- and issue thereon. eth may be tried by his county ; and the said *John* likewise prays the same : Therefore the sheriff is commanded, that he cause to come here in eight days of the purification of the Blessed Virgin *Venire Mary*, twelve (c) free and lawful men of the body of his county, every awarded. one of which to have at least ten pounds a year, of lands, tenements, or rent, by which the truth of the matter may be the better known, and who are no ways related either to the said *Richard* or *John*, to recognize and make a certain jury of the country between the parties aforesaid, of a plea of account ; because, as well the said *Richard* as the said *John*, between whom the controversy is, have submitted Another *themselves* to the jury ; at which day came here the parties aforesaid, *Venire.* but the sheriff hath not returned the writ ; therefore the said sheriff is, as before, commanded, that he cause to come here on the morrow of the Ascension of our Lord, twelve, and so forth, to Another *recogniz* in form aforesaid, and so forth, at which day came *Venire.* here the parties, and so forth, but the sheriff hath not returned the writ ; therefore the said sheriff is, as before, commanded, that he cause to come here in three weeks from the day of the *Holy Trinity*, twelve, and so forth, to recognize in form aforesaid, and so forth, at which day the jury in the said cause between the said parties,

E 4

(a) In the original in *Lutwych*, 58. The words in *Italick* are not inserted, but after the words force and injury are inserted, when, &c.

(b) And management in the original.

(c) The several words in *Italicks* are omitted in *Lut.* and in their stead in the several places an, &c.

Account.

The jury
put in re-
spect.

parties were respited until this day, (*that is to say*) from the day of St. Michael, in three weeks, to be then here, unless the justices of our Sovereign Lord the King, appointed to take the assizes in the county aforesaid, by the form of the statute, *and so forth*, had come before that time, (*to wit*) on Monday the fifteenth of August

The parties
appear at
the assizes.

then next following, at *Horsham* aforesaid, in the county aforesaid : And now here at this day cometh the said *Richard*, by his said attorney ; and the aforesaid justices appointed to take the assizes before, *and so forth*, sent here the record in these words —

The postea,
which is re-
turned by
the associ-
ate, indorsed
on the back of
the record of
Nisi Prius.

Afterwards the day and place within contained, at the assizes, appointed to be held in the county of *Sussex*, by the form of the statute, *and so forth*, before Sir *John Holt*, Knight, his Majesty's Chief Justice assigned to hold pleas before the King himself, and Sir *Henry Hatsel*, Knight, one of the Barons of the said King's Exchequer, came as well the within written *R. P.* as the within written *John Clarke*, by their attornies within contained : And the jurymen of the jury whereof mention is made within, thereto required, likewise came : who being elected, tried, and sworn to speak the truth of the within contents, upon their oaths say, that the aforesaid *John Clarke* did not account with * the said *Richard* for the with-

Verdict for
the plain-
tiff.
(P * 44)
Judgment
that the de-
fendant
shall ac-
count.
Capias
awarded
against the
defendant.

in written one hundred and thirty-two bushels of wheat, as the said *Richard* within in his replication hath alledged ; therefore IT IS CONSIDERED that the aforesaid *John Clarke* shall account with the said *Richard* for the time and wheat aforesaid, and the same *John* shall be at the mercy of the court, because he had not before accounted for the same, (*d*) and the sheriff is commanded that he take the said *John Clanke*, if he may be found in his bailiwick, and him safely keep, so that he have his body before the justices here, from the day of St. Martin, in fifteen days, to account with the said *Richard* for the aforesaid one hundred and thirty two bushels of wheat, he being convicted of not accounting in form aforesaid ; at which day came here the aforesaid *Richard*, by his attorney, and the said *John Clarke* did not come ; and the sheriff returned, that he is not to be found, *and so forth* ; therefore the said sheriff is commanded, as before, that he take the said *John Clarke*, if, *and so forth*, and him safely keep, *and so forth*, so that he have his body before the justices here in eight days of St. Hillary, to account with the said *Richard* as aforesaid ; at which day came here the aforesaid *Richard*, by his said attorney, and the sheriff hath done nothing thereupon, nor returned the writ ; therefore, as above, another writ was delivered to him in form aforesaid, returnable here from the day of Easter, in fifteen days ; at which day came here the aforesaid *Richard*, by his said attorney, and the sheriff hath done nothing thereupon, nor returned the writ ; there-
fore,

(d) And so forth.
is an, &c.

(e) Instead of the words in Italicks in the original

Account.

fore, as above, another writ is made and delivered to him in form
afore said, returnable here on the morrow of the *Holy Trinity*; at
which day came here the afore said *Richard*, by his said attorney,
and the sheriff hath done nothing thereupon, nor returned the writ;
therefore, as above, another writ is made and delivered to him in
form afore said, returnable here from the day of *St. Michael*, in
three weeks; and now at this day (*to wit the afore said three weeks
of St. Michael*) came here as well the afore said *Richard*, by his
said attorney, as the said *John Clarke* in his proper person, and
thereupon the said *John (s)* freely offered himself here in court, to
account with the said *Richard* for the time afore said, and for the
said one hundred and thirty-two bushels of wheat, whereof he is
convicted by the said court here of our Sovereign Lord the King,
for not accounting with the said *Richard*, and so forth, and he the
said *Richard* prayeth that auditors may be assigned by this court, to
audit the account of the said *John*; and thereupon auditors are
assigned by this court, (*to wit*) *R. C. Gent.* and *R. W. Gent.* to
audit the said account of the said *John*; which said auditors ap-
pointed a day, (*to wit* the twentieth day of *November*, this instant
term, at the office of *John Cooke*, Esq; chief prothonotary of this
court, in the *Inner Temple*, *London*, *Gent.* and *John Harris*, of
Clements-Inn in the county of *Middlesex*, *Gent.* came here in court
in their proper persons, and they and each of them become bail for
the said *John Clarke* in the sum of thirty pounds; and the afore said
John Clarke doth undertake, under the penalty of sixty pounds,
that he the said *John Clarke* shall appear before the said auditors,
at the office of the said chief prothonotary, on the said twentieth
day of *November*, above appointed, and so from * day to day till the
same account shall be finished; and also that the said *John Clarke*
shall appear before the justices here at such a day as the said auditors
shall deliver in the said account, and so every day from day to day
until the same account shall be determined, and judgment there-
upon shall be given, and shall render himself to the prison of the
Fleet, there to abide until he shall make satisfaction to the said
Richard for the arrearages of such account found against him, if
judgment should be given against him; which said sum of thirty
pounds they the said *Nicholas Downing* and *John Harris*, and each
of them, agree shall be levied on their goods and chattels, and
which said sum of sixty pounds the said *John Clarke* acknowledged
shall be levied on his goods and chattels, to the use of the said
Richard Pierce, if it shall happen that he the said *John* shall at any
day make default, or if judgment shall be given against him, he
shall not render his body to the prison afore said, to stay there until
he shall have made satisfaction to the said *Richard* for the arrearages
so found against him; And it is directed to the same auditors, that
they have the account of the said *John Clarke* taken before them
of the premisses before the justices of our Sovereign Lord the King
here,

Auditors
assigned.

Bail for the
defendant
for his ap-
pearance
from day
to day.

(P * 45)

(s, Perhaps the Latin word *gratis* in the original, is now sufficiently
anglicised to be adopted instead of freely.

Account.

here, from the day of *St. Martin* in fifteen days; at which day here came as well the said *R. P.* by his said attorney, as the said *John Clarke* in his proper person, and the said auditors in their proper persons likewise came here into this court, and delivered the account of the said *John Clarke* taken of the premisses before them, the tenor of which followeth in these words: *The account of John Clarke, taken out at the office of John Cooke, Esq, Chief Prothonotary of the Court of Common Bench, in the Inner-Temple, London, on the twelfth day of November, in the eleventh year of the reign of our Sovereign Lord the now King, before Richard Cooke, Gent. and Robert Waring, Gent. auditors assigned to audit the account of the said John Clarke, for the time that he was bailiff to the said R. P. of divers bushels of wheat, to make merchandize and profit thereof for the said Richard, the said Richard being present at the taking the said account.*

Account
how he had
disposed of
the goods,
&c.

Imprimis: The said *John Clarke* doth confess and say, that he received at several times from the said *Richard*, at the parish of *Bosham* aforesaid, in the county of *Sussex*, one hundred and twenty bushels of wheat, light bad weight, and no more, to make merchandize and profit thereof for the said *Richard*, and that after the receipt thereof, he the said *John*, for making the said wheat saleable, and to cause the same to be of a just weight, at the special instance of the said *Richard*, then and there added ten bushels of the best wheat of the said *John* to the said one hundred and twenty bushels of wheat of the said *Richard*, and mingled it with the same, and ground them together, and caused the flower arising from the same afterwards to be carried and transported from the parish of *Bosham* aforesaid to the town of *Portsmouth*, in the county of *Southampton*, and there sold the same for eighteen pounds of lawful money of *England*; which said eighteen pounds the said *John* there received and had; and the said sale was made and transacted in manner following. (*to wit*) the said *John* the tenth of *June*, in the seventh year of the reign of our Sovereign Lord the King that now is, for necessary sale thereof, caused to be carried and transported *by seain a certain ship from the parish of *Bosham* aforesaid to the town of *Portsmouth*, in the county of *Southampton* aforesaid, forty bushels, parcel of the said flower, and sold the same for six pounds, parcel of the said eighteen pounds; and afterwards, (*to wit*) the tenth of *July*, in the seventh year aforesaid, the said *John*, for the necessary sale thereof, caused other forty bushels, parcel of the said flower, to be carried and transported from the parish of *Bosham* aforesaid to the said town of *Portsmouth*, and sold the same for six pounds, other part of the said eighteen pounds; and afterwards, (*to wit*) the tenth day of *August*, in the seventh year aforesaid, he the said *John* caused to be carried and transported from the parish of *Bosham* aforesaid, to *Portsmouth* aforesaid, fifty other bushels of flour, residue of the whole flour of one hundred and twenty bushels of

(P * 46)

Account.

of the wheat of the said *Richard*, and ten bushels of the wheat of the said *John*, ground and mixed together as aforesaid, and sold the same at *Portsmouth* aforesaid for six pounds, residue of the eighteen pounds aforesaid, and charged himself therewith; and the said *John* alledgeth and saith, that after the several sales aforesaid, by him made as aforesaid, (to wit) the tenth day of *September* in the seventh year aforesaid, at *Bosham* aforesaid, he the said *John* paid to the said *Richard* ten pounds of lawful money of *England*, on account of the said one hundred and twenty bushels of wheat received as aforesaid, and prayeth an allowance thereof to be made to him; and the said *John* prayeth further to be allowed to him for the several subsequent matters and sums, and also for the surpluse as followeth, that is to say, *imprimis*, for new winnowing, sifting, and cleansing the first two loads, two shillings and six-pence. *Item*, for grinding the same to toll came to seven shillings and six-pence, *Item*, for carriage from the mill to the key, one shilling and six-pence. *Item*, for sea-carriage to *Portsmouth*, and tonnage, eight shillings. *Item*, for landing at *Portsmouth*, and carriage to the baker's house there, three shillings. *Item*, for a certificate from the Custom-house at *Chichester*, three shillings. *Item*, for allowance of that certificate at *Portsmouth* one shilling and four-pence; for the use of the sacks, and bringing them back, two shillings and six-pence. *Item*, to the baker's man for shooting the meal six-pence. *Item*, for the defendant's journey to *Portsmouth* to sell that load of meal ten shillings. *Item*, for the defendant's charges at another day going to *Portsmouth* for the money for the meal five shillings. *Item*, the like charges on the second load, two pounds four shillings and ten-pence. *Item*, the like charges for the third load, two pounds four shillings and ten-pence. *Item*, for the defendant's salary upon the whole one pound. *Item*, for ten bushels of the defendant's best wheat, put to the plaintiff's bad light wheat to make weight and measure, two pounds. *Item*, paid to the plaintiff by the defendant in money ten pounds. Total, nineteen pounds fourteen shillings and six-pence. Remains due to the defendant in surplus of the said account, one pound fourteen shillings and six-pence.

N. Bond.

* And the aforesaid *Richard Peirce* saith that the plea of the said *John Clarke* above pleaded in his discharge, is not sufficient in law to discharge the said *John Clarke* from the premises, and that he is under no necessity, or any wise bound by the law of the land, to answer thereto: And this he is ready to verify; wherefore, for want of a sufficient plea in this cause, the said *Richard* prayeth judgment, and that the said *John* may be charged with the one hundred and thirty-two bushels of wheat, mentioned in the aforesaid declaration, and so forth.

(P * 47)
Demurrer.

A joinder in demurrer.

And

Account.

And judgment was given by the court, that the plaintiff ought to recover what he had declared for ; and one of the reasons was this, that the defendant had given in his account in *English* ; (g) the second reason was, that the defendant had pleaded that he had fully accounted, and confessed the receipt of all the one hundred and thirty-two bushels, and in his account before the auditors he makes mention of only one hundred and twenty bushels.

3 Cro. 806.
Fitz. account 109.
respond.
29 Alleyn.
88.

DIGHTON and others against WHITING.

Hill. 6 W. 3.

Account by
some of the
plaintiffs,
in their
own right,
and by one
of them as
executrix
against the
defendant
as bailiff.
Lut. 51.
N. L. 21.

The goods
with which
the defend-
ant is
charged.

(P*48)

City of *Bristol* (to wit) : *Joshua Whiting*, late of the city of *Bristol*, merchant, was summoned to answer to *George Dighton*, *John Jones*, *Robert Bound*, *Thomas Hicks*, *John Love*, *Henry Davis*, *George Mason*, merchants, and *Mary King*, widow, executrix of the will of *Nathaniel King*, merchant, her late husband, deceased, of a plea that he should render to them his reasonable accounts for the time in which he was bailiff to the said *G. D. J. J. R. T. J. L. H. G. M.* and the said *N.* in his life-time, in the city of *Bristol*, in the county of the same city ; and thereupon the same *G. D. J. J. R. T. J. L. H. G. M.* and *N.* by *Francis Oldfield* their attorney, say, that whereas the aforesaid *Jos.* had been a bailiff to the said *G. D. J. J. R. T. J. L. H. G. M.* and the said *N.* in his life-time, (to wit) at the city of *Bristol* aforesaid, in the parish of *All Saints*, in the county of the same city, from the twenty-third day of *December*, in the first year of the reign of their late Majesties *William* and *Mary*, late king and queen of *England*, until the twenty-ninth of *January*, in the second year of the reign of the same king and queen, and for that time had the care and management of divers goods and merchandizes of the said *G. D. J. J. R. T. J. L. H. G. M.* and the said *N.* now deceased, (to wit) fifty-three ells of *Dutch dowlas*, (and so of divers or other goods, here mentioning the contents thereof) to merchandize and make profit thereof for the said *G. D. J. J. R. T. J. L. H. G. M.* and *N.* and to give a reasonable account thereof to the said *G. D. J. J. R. T. J. L. H. G. M.* and the aforesaid *N.* in his life-time, whenever he should be thereto requested ; notwithstanding the aforesaid *Jos.* altho' often requested, hath not given a reasonable account, as aforesaid, to the said *G. D. J. J. R. T. J. L. H. G. M.* and *N.* in his life-time, or either of them, or to the said *G. D. J. J. R. T. J. L. H. G. M.* and *N.* after the death of the said *N.* or to either of them, but altogether refused to render such account to the said *G. D. J. J. R. T. J. L. H. G. M.* * and *N.* in the life of the said *N.* or either of them, and to the said *G. D. J. J. R. T. J. L. H. G. M.* and *M. K.* doth now refuse so to do ; wherefore they say that they are rendered worse in their circumstances, and have sustained damage to the value of one thousand

(g) That reason no longer holds the pleadings being now all in *English*.

Account.

thousand pounds, and therefore brought (*h*) their suit, *and so forth* :
 And the aforesaid *Mary* bringeth here into court the letters testamentary of the said *N.* by which it sufficiently may appear the said *Mary* to be executrix of the testament of the said *N.* and thereof to have administration, *and so forth.*

Letters testamentary produced by plaintiff as executrix

Devon' (to wit) : A. B. late of *S.* in the county aforesaid, yeoman, late church-warden of the parish church of *S.* aforesaid, was summoned to answer to *C. D.* and *E. F.* now church-wardens of the said parish church of *S.* of a plea that he render to them his reasonable account for and during the time that he was church-warden of the said parish church of *S.* and receiver of the monies and goods of and belonging to the same church, *and so forth* ; and whereupon the said *C. D.* and *E. F.* by *J. M.* their attorney, say, that whereas the said *A. B.* was church-warden of the parish church aforesaid, from the feast of *Easter*, (*in such a year*) until the feast of *Easter* then next following, and during that time, had the care and management of the goods and parochial ornaments of the same church, and was receiver of the goods and monies of and belonging to the parish church aforesaid, and during that time had and received of the monies of and belonging to the said parish church, by the hands of, (*naming the several parishioners of which he had received monies*) and of the goods of that church, (*naming them*) by the hands of, (*naming the former church wardens of whom he had received goods*) late church-wardens of the said parish church, to render an account thereof to the said *C. D.* and *E. F.* his successors, church-wardens of the said parish church ; nevertheless the said *A. B.* although often thereto required, hath not yet rendered his reasonable account of the time, monies and goods to the said *C. D.* and *E. F.* now church-wardens of the said parish church of *S.* but hath hitherto, and doth even now, refuse so to do ; wherefore the said *C. D.* and *E. F.* say, that they as church-wardens of the said parish church of *S.* are rendered worse in their circumstances, and have sustained damage to the value of five hundred pounds ; and whereupon they bring this suit, *and so forth.*

An account by one church-warden against another. Lill. Ent. 12 Pract. Reg. 267. 680. 30. 34.

R. S. late of *Southmolton* in the county of *Devon*, carrier, was summoned to answer to *A. B.* of a plea that he rendered to him a reasonable account for the time he was receiver of the monies of him the said *A. B.* *and so forth* ; and thereupon the same *A. B.* by *R. M.* his attorney, saith, that whereas the aforesaid *R. S.* had been receiver of the monies of him the said *A. B.* from the tenth day of *March*, in the fourth year of the reign of his present majesty, to the tenth day of *March* then next following, during which time he the said *R. S.* had received of the monies of the said *A. B.* at *Southmolton* aforesaid, in the county aforesaid, sixty-six pounds, by the hands of *Solomon Ashley*, and by the hands of *William Ashurst* forty six pounds, and by the hands of *William Poole* thirty-six pounds, in the whole amounting to the sum of one hundred and forty-eight

An account for monies received by the hands of divers persons.

(*b*) I apprehend this ought to be bring their suit.

Account.

(P * 49) * forty-eight pounds, to render a reasonable account thereof to the said *A. B.* when he should be thereto requested; nevertheless the aforesaid *J.* although often requested, hath not as yet rendered such reasonable account to the said *A. B.* but hitherto hath, and still doth, refuse so to do; wherefore the said *C.* saith he is thereby injured, and hath sustained damages to the value of two hundred pounds: And therefore he brings this suit, *and so forth.*

Against
bailiff and
receiver
having the
care and
manage-
ment of di-
vers quan-
tities of sea-
coals.

Newcastle upon Tyne (to wit): A. B. complaineth of *R. D.* in the custody of the marshal, *and so forth*, of a plea, that he should render to him his reasonable account for the time that he was bailiff to *J.* in his life-time, in the vill of *Newcastle upon Tyne*, and receiver of the money of the said *J.* for that whereas the aforesaid *William* had been bailiff to the said *J.* in the said vill of *Newcastle upon Tyne* in the county of the same vill, the 20th day of *April*, in the year of our Lord one thousand seven hundred thirty-two, at the place aforesaid, for one whole year then next following, and during all that time had the care and management of divers quantities of sea-coals of the said *J.* and had received of money of the said *J.* to the amount of three thousand pounds of lawful money of *Great Britain*, with his own hands to make merchandize and profit thereof, for, and to render a reasonable account to the said *J.* of the same, whenever he should be thereto requested, at *Newcastle upon Tyne* aforesaid; nevertheless, the said *R. D.* altho' often requested, hath not hitherto rendered a reasonable account to the said *A. B.* thereof, but hath hitherto, and doth now refuse so to do, to the damage of the said *J.* four thousand pounds: And therefore brings his suit, *and so forth.*

Against a
bailiff and
receiver
having the
care and
manage-
ment of all
the lands,
and tene-
ments, rents
profits, es-
tate, &c. of
plaintiff, as
well as per-
sonal.

Suffolk (to wit): George Bond, Esq; complaineth of *W. A.* in the custody of the Marshal, *and so forth* of a plea, that he should render to him his reasonable account for the time that he was bailiff to the said *G.* at *A.* in the county aforesaid, and there receiver of the money of the said *G.* for that whereas the said *W.* the first of *October*, in the first year of the reign of our Sovereign Lord *George* the second, King of *Great Britain*, *and so forth*, until the first of *May* the sixth year of his reign, at *A.* aforesaid, had been bailiff of the said *G.* of the manors of *H. J.* and *K.* and ten messuages, *and so forth, here naming the rest of the lands*, and during all that time had the care and management of the horses, &c. *here naming the rest of the cattle or other goods or chattles of the plaintiff*, to make merchandize and profit thereof, for the said *G.* and to render to the said *George* a reasonable account of the same: And during the time aforesaid, that the said *W.* had been bailiff to the said *G.* at *A.* aforesaid, in the county aforesaid, he the said *William*, at *A.* aforesaid, received of the money of the said *G.* ten thousand pounds, by the hands of *R. S.* to make merchandize and profit thereof, for, and to render to the said *George* a reasonable account thereof, when-

ere

Account.

ever he should be thereto requested ; nevertheless, the said *W.* tho' often thereto requested, hath not rendered a reasonable account thereof to the aforesaid *George*, but hath altogether hitherto refused, and yet doth refuse so to do, to the damage of the said *George* twenty thousand pounds : And therefore he brings this suit, *and so forth.*

* *Devon (to wit) : A. B.* was summoned to answer to *C. D.* of a plea, that he render to him his reasonable account for the time that he was his bailiff in *E.* and receiver of the monies of the said *C.* *and so forth*, and therefore the said *C.* by *John Cock* his attorney, complains, that whereas the said *A.* was bailiff to the said *C.* of his office of the constable of the castle of *D.* in the aforesaid county of *Devon*, from (*such a day*) until (*such a day and year*) during all which time, the said *A.* had the care and management of the said office, and of all and singular the issues and profits belonging to and arising from the same office, as thereby having the custody of all the forests, parks, warrens, and other places appertaining to the said office, to make profit thereof for the benefit of the said *C.* And also during the time aforesaid, the said *A.* had received of the monies of him the said *C.* by the hands of one *G. O.* at *D.* One hundred pounds, to merchandize, and make profit thereof, for him the said *C.* and to render a reasonable account to the said *C.* of the said issues, profits, and monies for the time aforesaid, when he should be thereunto required ; nevertheless, the said *A.* although often required, hath not yet rendered his said reasonable account to the said *C.* of the premisses, but hitherto hath, and still doth refuse so to do ; wherefore the said *C.* saith, that he is thereby injured, and hath sustained damages to the value of one thousand pounds : And therefore he brings this suit, *and so forth.*

(P * 50)
An account
against a
bailiff of an
office and
receiver of
monies.

Norfolk (to wit) : A. B. late of, *and so forth*, was summoned to answer to *C. D.* and *E. F.* of a plea, that he render to them his reasonable account for the time that he was bailiff to them the said *C.* and *E.* at *C.* in the said county, and there likewise receiver of the monies of the same *C.* and *E.* *and so forth* ; and thereupon the said *C.* and *E.* by *H.* and *J.* (*who are admitted by the court here to prosecute for the same C. and E. who are within age, as the next friends to them the said C. and E.*) say, that whereas the aforesaid *B.* was bailiff to them the said *C.* and *E.* of one messuage, thirty acres of land, *and so forth*, with the appurtenances in *A.* aforesaid, from the five and twentieth day of *May*, in the first year of his present Majesty *George* the second, King of *Great Britain*, *and so forth*, to the five and twentieth day of *March*, in the fifth year of his said Majesty's reign, and during all that time had the care and management thereof, and sufficient power to improve, let and demise the tenements aforesaid, with the appurtenances, and to collect and receive the rents, issues and profits of all the said premisses to the use of them the said *C.* and *E.* aforesaid, for the benefit of the said *C.* and *E.* and was, and during all that time had been receiver of the monies of them

An account
as bailiff
and receiver
of monies

Account.

them the said *C.* and *E.* and as such had received of the monies of them the said *C.* and *E.* at *A.* aforesaid, by the hands of *R. W.* one hundred pounds, and by the hands of *T. M.* six pounds, to render his reasonable account thereof to the same *C.* and *E.* when he should have been thereunto required; nevertheless, the aforesaid *B.* altho' often required, hath not rendered such his reasonable account thereof to the same *C.* and *E.* or either of them, or to any other person on their behalf, but always hitherto hath, and now doth refuse so to do; wherefore they the said *C.* and *E.* by the said *H.* and *J.* their nearest friends say, that they are thereby injured, and have sustained damages to the value of ten pounds: And therefore they bring this suit, *and so forth*

(P * 51) * And the said *A.* by *T. H.* his attorney, comes and defends the charge of the force and injury, and the damages, and whatever else he ought to defend, where and when this court will please to take the same into consideration: and as to that, that the said *C.* and *E.* do suppose him the said *J.* to have been a bailiff to them the said *C.* and *E.* of the tenements aforesaid, with the appurtenances in *C.* aforesaid, and thereof to have had the care, management, and power to improve and demise the said tenements aforesaid, with the appurtenances, and to collect and receive the rents, issues, and profits of the same, to the use of the aforesaid *C.* and *E.* the said *B.* saith, that he never was bailiff to the said *C.* and *E.* of the tenements aforesaid, or of any parcel thereof, to render an account thereof to the same *C.* and *E.* when he should be thereunto required, as the aforesaid *C.* and *E.* have for that purpose above declared; *and of this he puts himself upon his country*, and the said *C.* and *E.* likewise do the same: and as to that, that the aforesaid *C.* and *E.* do suppose him the said *J.* to have been the receiver to the said *C.* and *E.* of one hundred pounds, by the hands of *R. W.* and of the aforesaid six pounds, by the hands of the aforesaid *T. M.* the same *J.* thereto saith, that he never was a receiver to the said *C.* and *E.* of the monies aforesaid, or of any parcel thereof, by the hands of the aforesaid *R. W.* and *T. M.* or either of them, to render an account thereof to the same *C.* and *E.* when he should have been thereunto required, as the aforesaid *C.* and *E.* have above declared; *and of this likewise he puts himself upon his country*; and the aforesaid *C.* and *E.* do likewise the same; therefore, to try as well this as the other issue above joined, between the parties aforesaid, the sheriff of *Devon* is commanded, that he cause to come here such a day, *and so forth.*

An account
against a
bailiff of a
hundred.

Devon (to wit): *S. A.* complaineth of *J. M.* in the custody of the marshal of the King's *Marshalsea*, present before his Majesty, of a plea, that he render to him his reasonable account from the time that he first began to be bailiff to the said *S.* of his liberty and franchise of his hundred of *C.* and also of the manors, lands and tenements of him the said *S.* of *B. R.* and *H.* *and so forth*, for this cause, that is to say; that whereas the said *J.* hath been bailiff to him

Account.

him the said *A.* of his liberty and franchise of the hundred of *C.* and likewise of the manors of him the said *S.* of *B. R.* and *H.* and of the lands and tenements (*that is to say*) of twenty messuages, *and so forth*, with the appurtenances in *B. H.* and *R.* aforesaid, (*from such a day until such a day*) and during all that time had the care and management of the execution and return of all and all manner of writs, warrants and precepts, and had the receipt of all fees, advantages, and profits, by reason of the execution and return of the said writs, warrants and precepts, within the aforesaid manors, lands and tenements, and within every parcel thereof, and also the receiving and collecting of all fines, redemptions, issues, forfeitures, amercements, and for the license of fines and concords, and * likewise (P * 52) of all manner of goods and chattels of felons, fugitives, outlawries, actions, condemnations, and attainments, and of all convictions either put in exigent for felony or treason; and also of the chattels of felons themselves, and of all deodands, wrecks of the sea, treasure found, and of all other goods and chattels which are called waives and strays, and also of all profits of fines and amercements, evasions and escapes of all and singular felons and prisoners, from what prison soever happening and arising within the aforesaid hundred, and the manors, lands, and tenements, with the appurtenances, to the use of him the said *A.* and to make advantage and profit thereof and to render a reasonable account thereof to him the said *A.* whenever he should be thereto required; nevertheless the said defendant, altho' often requested, hath not rendered such reasonable account, but always hitherto hath, and yet doth refuse so to do; and therefore the said *S.* saith, that he is thereby injured and hath sustained damage to the value of three hundred pounds; and therefore brings this suit, *and so forth.*

TURNER against TURNER.

Plaf. 13 W. 3.

Devon (to wit): *Charles Turner*, gent. complaineth of *John Tur* Lilly 13.
ner, gent. in custody of the marshal, *and so forth*, of a plea, that he 1 Vent 105.
render to him his reasonable account for the time he was bailiff, to 1 Salk. 9.
him the said *Charles* at *Swarwicke*, in the parish of *Alfreton*, in the
county aforesaid, for this cause (*that is to say*) that whereas it was
provided by the common council in the reign of his late Majesty,
King of *England*, that the guardian of lands and tenements held in
socage, when the heir should come to his full age, should render
his reasonable account of the issues and profits of the lands and
tenements, for the time he should so have the custody of the said lands
and tenements, by reason of the minority of such heir: And altho'
the said *John* had the custody of the lands and tenements of him the
said *Charles* (to wit) of two messuages, three cottages, five gardens,
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and eighty acres of land, thirty acres of meadow, eighty acres of pasture, and thirty acres of wood, with the appurtenances, in *Swanwicke* aforesaid, in the parish of *Alfreton* aforesaid, in the said county, from the sixth day of *January*, in the year of our lord one thousand six hundred eighty-four, until the twentieth day of *July*, in the year of our lord one thousand six hundred ninety-one, (the same *Charles* during all that time being within the age of fourteen years) and during all that time the said *John* received the issues and profits of the said messuages and tenements; nevertheless, the said *John* tho' often requested, *and so forth*, hath not rendered such account to the said *Charles*; but on the contrary always hitherto hath, and now doth refuse to render the same. And whereas also the said *John* (to wit) the twentieth day of *July*, in the first year of the reign of his present Majesty, at *Swanwicke* aforesaid, in the parish of *Alfreton* aforesaid, in the county aforesaid, was bailiff to the said *Charles* of the two messuages, three cottages, five gardens, and eighty acres of land, three acres of meadow, eighty acres of pasture, and thirty acres of wood, with the appurtenances in *S.* aforesaid, in the parish and county aforesaid, from the said twentieth day of *July*, in the said first year of the reign of his present Majesty, till the seventh day of *October*, in the fifth year of his said Majesty's reign, and during all that time had and received the annual profits thereof, to render to the said *Charles* his reasonable account thereof, when he should be thereto requested; nevertheless, the said *John*, altho' often requested, *and so forth*, hath not yet rendered such reasonable account to the said *Charles*, but hath hitherto, and still doth refuse so to do, to the damage of him the said *Charles* one thousand five hundred pounds: And therefore he brings this suit, *and so forth*.

(P * 53)

Pleas before our Sovereign Lady the Queen, of Trinity Term, in the seventh Year of the Reign of her said present Majesty the Lady Anne, Queen of Great Britain, and so forth.

The memorandum.
10 Mod.
22.

London (to wit): *Be it remembered*, that lately (that is to say) in *Easter Term* last past came before our sovereign lady the Queen at *Westminster*, *Joseph Bishop* and *John Andrews*, the present churchwardens of the parish of *St. Bartholomew the less*, near the *Royal Exchange*, *London*, and brought here into this court, then held there, their bill against *John Eagle* and *Daniel Franklyn*, the late churchwardens of the same parish church, in the custody of the marshal of the *Marshalsea* of our said sovereign lady the Queen, present before her said Majesty, of a plea of account; and there are pledges of prosecuting, (that is to say) *John Doe* and *Richard Roe*; which said bill follows in these words, (that is to say)

London

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London (to wit): *Joseph Bishop* and *John Andrews*, the present church-wardens of the parish church of *St. Bartholomew the less*, near the *Royal Exchange*, *London*, complain against *John Eagle* and *Daniel Franklyn*, late church-wardens of the same parish church, in the custody of the marshal of the *Marshalsea* of our sovereign lady the Queen, (present before her said Majesty) of a plea that they should render to the same *Joseph Bishop* and *John Andrews*, the present church-wardens of the parish church aforesaid, a reasonable account for the time in which the said *J. E.* and *D. F.* were church-wardens of the parish church aforesaid, and receivers of the money, goods and chattels of the parishioners of the parochial church of the parish of *St. Bartholomew the less*, near the *Royal Exchange*; by reason, that whereas the said *John Eagle* and *Daniel Franklyn*, were church-wardens of the aforesaid church, at *London* aforesaid, in the parish aforesaid, in the ward of *Breadstreet*, from the feast of *Easter*, in the year of our Lord one thousand seven hundred and six, until the feast of *Easter* one thousand seven hundred and eight, during which time, by virtue of their said office, they had the care and management of the parochial goods and chattels of the parishioners of the said parish church; and the same *J. E.* and *D. F.* received divers sums of money hereafter mentioned, to the use of the parishioners of the church aforesaid, paid to them by the hands of divers persons hereafter named, to render an account for the same, (to wit) by the hands of *William Whitehead* twenty-one pounds six shillings and six pence; by the hands * of *Mr. Evans* six pounds ten shillings; by the hands of *John Andrews* seven pounds sixteen shillings and eight pence; by the hands of *John Chase* fifty six pounds; and as church-wardens of the parish church aforesaid, received by the hands of *William Whitehead*, late church-warden of the same church, two surplices——(and so mention the goods,) and so forth, to render a reasonable account thereof to the parishioners of the said parish church: And afterwards (to wit) the fifth day of *April* one thousand seven hundred and eight, the said *J. E.* and *D. F.* were removed from their office of church-wardens aforesaid, at *London* aforesaid, in the parish and ward aforesaid; and the aforesaid *J. B.* and *J. A.* now plaintiffs, afterwards (to wit) the same fifth day of *April*, in the year last aforesaid, at *London* aforesaid, at the parish and ward aforesaid, were duly elected and appointed into the said office of church wardens of the said parish church, by the parishioners of the said church, and are now church-wardens of the same: nevertheless the said *J. E.* and *D. F.* altho' often requested, have not yet rendered their account of the aforesaid money and goods to the same *J.* and *J. A.* but hitherto have, and still do refuse to render such account to the said *J.* and *J. A.* to the damage of the parishioners of the parish aforesaid two thousand pounds: And therefore they bring their suit, and so forth.

And now here at this day, (to wit) on *Friday* next after the morrow of the *Holy Trinity*, this same term, (till which day the said

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186. The
declaration.
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(P * 54)

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Account.

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(P * 55)

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J. E. and D. F. had leave to imparle to the said bill, and then to answer, *and so forth*,) before our sovereign lady the Queen at *Westminster*, came as well the said *Joseph Bishop* and *John Andrews*, by their said attorney, as the said J. and D. F. by J. F. gent. their attorney; and the said J. E. and D. F. defend themselves against the charge of the force and injury, and the damages, and whatsoever else they ought to defend where and when this court will please to take the same into consideration, and say, that the said J. and J. A. ought not to have their action aforesaid against the said J. E. and D. because they say, that they the said J. and J. A. never were elected and constituted into the office of church-wardens of the said parish church, in manner and form as the said J. and J. A. above for that purpose have declared; and of this they put themselves upon their country; and the aforesaid J. B. and J. A. do likewise the same: Therefore the jury thereof come before our sovereign lady the Queen at *Westminster*, on *Tuesday* next after eight days of the *Holy Trinity*; and who neither, *and so forth*, to make a jury, *and so forth*, because as well, *and so forth*; the same day is given to the aforesaid parties there, *and so forth*; afterwards the process thereof being continued between the said parties of the plea aforesaid, by juries thereof respited, before our said sovereign lady the Queen at *Westminster*, until *Saturday* next after three weeks of *St. Michael*, from thence next following, unless her said Majesty's faithful and well-beloved Sir *John Holt*, Knight, Chief Justice, assigned to hold pleas in her said Majesty's Court, before the said Queen herself, before that time, that is to say, on *Saturday* next after the end of the said *Trinity* term, at *Guildhall, London*, according to the form of the statute, *and so forth*, should come by default of jurors, *and so forth*; at which day* the said *Joseph Bishop* and *John Andrews*, by their said attorney, come before our sovereign lady the Queen at *Westminster*, and her said Majesty's said Chief Justice, before whom, *and so forth*, sent hither his record taken before him, *in these words*: Afterwards the day and year within contained before the said Sir *John Holt*, Knight, her said Majesty's Chief Justice, assigned to hold pleas in her said Majesty's Court, before the said Queen herself, (there being associated to him *John Ince*, gent. according to the form of the statute, *and so forth*,) the within *Joseph Bishop* and *John Andrews*, the present church-wardens of the parish church of *St. Bartholomew the less*, near the *Royal Exchange, London*, come by their attorney within contained, and the within written *John Eagle* and *Daniel Franklyn*, the late church-wardens of the same parish church, altho' solemnly required, never came, but made default; therefore the jury, whereof mention is made within, may be received against them by their default; and the jurors of the said jury being required, some of them, that is to say, *Nathaniel Troughton, Thomas Ward, John Watson, Brabazon Aylmer, Samuel Wood, John Nicholas, Alexander Cleeve, William Batson, and John Hill*, came, and

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and were sworn upon that jury, and because the residue of the jurors of the said jury did not appear, therefore other persons of as good circumstances, by the sheriffs of *London*, chosen for this purpose, at the request of the said *Joseph Bishop* and *John Andrews*, and by the command of the said Chief Justice, are newly appointed; the names of which are set down in the panel within written, according to the form of the statute in that case made and provided: And the jurors being so newly appointed, (that is to say) *William Levett*, *Israel Bennett*, and *Adam Bodens* being likewise come, (who being chosen, tryed, and sworn, together with the other jurors aforesaid, having been impanelled before) to declare the truth upon their oaths, upon their oaths say that the said *Joseph Bishop* and *John Andrews* (the now plaintiffs) were duly elected and constituted into the office of church-wardens of the parish within written, in manner and form as the said *Joseph* and *John* within have declared in that behalf: And because the court of our said sovereign lady the Queen now here are not yet determined what judgment to give of and concerning the premisses, a day therefore is given to the said *Joseph Bishop* and *John Andrews* to hear their judgment thereof before our said sovereign lady the Queen, until on *Wednesday* next after the morrow of *all souls*; for that the said court of our said sovereign lady the Queen now here are not yet, and so forth, at which day came the said *Joseph Bishop* and *John Andrews*, by their said attorney; whereupon, the court having seen and fully understood all and singular the premisses, and upon mature deliberation thereon had, and by reason it appeareth that the declaration aforesaid of the said *Joseph Bishop* and *John Andrews*, as to one thousand pounds, specified in the bill of the said *Joseph Bishop* and *John Andrews* to have been received by the hands of the parishioners of the said parish, and the matters in the same contained as to the said one thousand pounds, are uncertain and not sufficient in law to compel them the said *John Eagle* and *Daniel Franklyn* to render an account of the said one thousand pounds; therefore it is considered, that the bill of the said *Joseph Bishop* and *John Andrews* aforesaid, as to the said one * thousand pounds, by reason of the uncertainty of the same in that particular, shall be quashed, and so forth, and that the said *John Eagle* and *Daniel Franklyn* shall be thereof dismissed. And further it is considered, that as to all the residue of the said sums of money, and the goods and chattels in the same bill mentioned to have been received by and paid to the said *John Eagle* and *Daniel* by the hands of the said parishioners of the said parish, the said *John Eagle* and *Daniel Franklyn* shall account with the said *Joseph* and *John Andrews* for that time that the said *John Eagle* and *Daniel* had been church-wardens of the said parish church, and receivers of the money, goods and chattels of the parishioners of the said parish church of *St. Bartholomew the less*, near the *Royal Exchange*, and shall render a fair account thereof, and because they

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(P * 56)

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Account.

had not accounted before, they are in the mercy of this court. And afterwards, (*that is to say*) on *Saturday* next after the morrow of *St. Martin*, in the seventh year of the reign of her said present Majesty, came as well the said *Joseph* and *John Andrews*, by their said attorney, as the said *John Eagle* and *Daniel Franklyn* in their proper person before our said sovereign lady the Queen at *Westminster*, and the said *John Eagle* and *D. F.* immediately rendered themselves prisoners to the Marshal of our said sovereign lady the Queen, attending on the said Queen herself, who by reason of the premisses were committed to the custody of the said Marshal, and so forth, there to remain until, and so forth. Whereupon, *Robert Stone*, and *William Simons*, gentlemen, are assigned auditors by this her said Majesty's Court here, by the consent of the said *Joseph Bishop* and *John Andrews*, to hear and take the account of the said *John Eagle* and *Daniel Franklyn* of and concerning the premisses; which said auditors have appointed a day for the said parties to bring in and finish their said account before the said auditors, at the Queen's Bench office in the *Inner Temple, London* (*that is to say*) on *Saturday* next after fifteen days of *St. Martin* next following, to account, and so forth; and it is directed to the same auditors by the court of her said Majesty here, that they have the said account before her said Majesty at *Westminster*, on *Saturday* next after eight days of *St. Hillary* then next following; and thereupon came *Peter Way*, of the parish of *St. Swithin's London*, Serjeant at Mace, and *Samuel Birthwright*, of the parish of *St. Giles's Cripplegate, London*, Yeoman, in their proper persons, and became bail to procure the body of the said *John Eagle* before the said auditors, at the Queen's Bench office in the *Inner Temple, London*, aforesaid, on the said *Saturday* next after fifteen days of *St. Martin*, and so from day to day on every day that shall be appointed by the auditors to hear the matter in variance, until the said account shall be taken and adjusted before the said auditors; and to be likewise in this court from day to day, every day that shall be appointed for the said *John Eagle* so to be, until the said account shall be judicially finished and determined; and if it should happen, that the said *John Eagle* should be convicted in the said suit, that then they the said manucaptors, and each of them, and the said *John Eagle* for himself grant and agree, that all and every such sums of money, as the said *John Eagle* upon the said account shall be found to be in arrear to the said *Joseph Bishop* and *John Andrews*, shall be made of and levied upon the lands and chattels of each and every of them, to the use of the said *Joseph Bishop* and *John Andrews*, if so be that the said *John Eagle* himself

P * 57) should not pay such a sum or sums of money to the said *Joseph Bishop*

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Bishop and *John Andrews*, or render his body to the prison of the *Marshalsea* of our said sovereign lady the Queen. And also *Richard Godfrey* of the *Inner Temple*, *London*, Esq; and *John Meriden*, of the parish of *St. Michael Cornhill*, Cutler, came before our said sovereign lady the Queen at *Westminster*, and became manucaptors to have the body of the said *Daniel Franklyn* before the same auditors at the Queen's Bench Office in the *Inner Temple*, *London*, aforesaid, on *Saturday* next after fifteen days of *St. Martin*, and so from day to day at every day appointed by the said auditors, until the account before the said auditors should be adjusted, and should be likewise here in court from day to day at every day appointed for the said *Daniel*, so to be, until the said account should be compleated and determined; and if it should happen the said *Daniel Franklyn* should be convicted in the said suit, then the said manucaptors, and every of them, and the said *Daniel Franklyn* for himself granted and agreed that all every the sum and sums of money in which the said *Daniel Franklyn* should upon that account be found to be in arrear to the said *Joseph Bishop* and *John Andrews*, should be made and levied of the goods and chattles of them, and every of them, to the use of the said *Joseph Bishop* and *John Andrews*, if so be that the said *Daniel* should not pay such sum or sums of money to the said *Joseph* and *John Andrews*, or render his body to the prison of the *Marshalsea* of our said sovereign lady the Queen. And afterwards, as well the said *Joseph Bishop* and *John Andrews*, by their said attorney, as the said *John Eagle* and *Daniel Franklyn* came in their proper persons. And the same *John Eagle* and *Daniel Franklyn* prayed a further day to make up and bring in their said account before the same auditors at the Queen's Bench Office in the *Inner Temple*, *London*, until *Monday* next after eight day's of *St. Hillary*, to account, and so forth, and the same is by the said auditors granted, and so forth. The same day is given by the said auditors to the said parties there, and so forth; at which day, on *Monday* next, after eight days of *St. Hillary*, as well the said *Joseph* and *John Andrews*, by their said attorney, as the said *John Eagle* and *Daniel*, in their proper persons then and there came and prayed a further day to make up and perfect their said accounts of and concerning the premisses before the said auditors, at the Queen's Bench Office in the *Inner Temple*, *London*, (that is to say) on *Saturday* next after eight days of the purification of the blessed *Mary*, as well the said *Joseph Bishop* and *John Andrews* came before our said sovereign lady the Queen, at *Westminster*, by their said attorney, as the said *John Eagle* and *Daniel* in their proper persons, and the said auditors likewise came in their proper persons; and the said auditors brought here into this court the said account of and concerning the premisses made up before them, the tenor of which followeth in these words (to wit): The account of *John Eagle* and *Daniel Franklyn* made on *Saturday* next after eight days of the purification of the Blessed Virgin *Mary*, being the twelfth day of *February*, in the seventh year of the reign of our sovereign lady the Queen

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(P * 58) Queen of Great Britain, and so forth, at the Queen's Bench Office in the Inner Temple, London, before Robert Stone, gent. and William Simons, gent. auditors, * assigned by the court to hear and take the account of the said John Eagle and Daniel Franklyn, before our sovereign lady the Queen at Westminster, in the County of Middlesex, of several sums of money, in the whole amounting to two hundred thirty-four pounds, and of diverse goods and chattels: And for as much as the said John Eagle and Daniel Franklyn are appointed to account for the time they were church-wardens of the said parish of St. Bartholomew the less, near the Royal Exchange, London, and therefore they render here the following account, and pray to be allowed, and to be from thence discharged, for this reason, that being church-wardens of the said parish of St. Bartholomew the less, they the said John Eagle and Daniel Franklyn, the seventeenth day of May, one thousand seven hundred and six, at the parish aforesaid, paid for the necessary maintaining and taking care of the poor to be maintained and taken care of by the said parish, and allowed, and to be allowed the several sums following. (to wit.)

To William Emery two pounds thirteen shillings and five pence,
To Mary Morton one pound twelve shillings.
So here insert the account.

And the said John and Daniel further in accounting say, that the said sum of thirty pounds, by the hands of Mr. Guest, supposed as above in the said declaration to have been paid to the said John and Daniel, was paid by mistake of the said Mr. Guest, and that nothing thereof in any manner was due and payable to the said John and Daniel, as church-wardens of the said church, more than the said sum of three pounds fourteen shillings and six pence; for which reason the said John and Daniel, immediately after the receipt of the said thirty pounds, (that is to say, the day and year last mentioned) paid back again and restored to the said Mr. Guest, twenty-six pounds five shillings and six pence of the said thirty pounds.

And the said John and Daniel further accounting say, that the said sum of twenty pounds, supposed by the said declaration to have been paid by the hands of Robert Clouds to the said John and Daniel, as above, were paid thro' the mistake of the said Robert Clouds, nothing being then due or payable to the said John and Daniel, as church-wardens of the church aforesaid, by which the said John and Daniel immediately after receiving the same (to wit) the day and place last mentioned, did render back and restore to the said Robert Clouds the said twenty pounds; all which said several sums paid by the said John and Daniel as above, amount in the whole to three hundred sixty-five pounds three shillings and seven pence; wherefore the surplus of one hundred thirty-one pounds three shillings and seven pence, is and remains due to the said John and

Account.

and *Daniel*. And the said *John* and *Daniel* further accounting say, that true it is, that the said goods and chattels in the said declaration mentioned, came to, and are now in their hands, except one surplice, which was privately stolen away from them by certain persons unknown, and that the rest of the said goods and chattels are of the value of twenty shillings, and no more, and this the said *John Eagle* and *Daniel Franklyn* are ready to verify; wherefore they pray the said twenty shillings being first * deducted and allowed out of the said surplusage) that the said *John* and *Daniel* may be allowed (P * 59) the several payments above specified in their said account, and may be allowed the residue of the said surplusage above the said twenty shillings, and that the said *John* and *Daniel* may be discharged from the said premisses, whereof they are convicted to account, and so forth.

And the said *Joseph Bishop* and *John Andrews* say, that the said *John Eagle* and *Daniel Franklyn*, or either of them, ought not to be allowed or discharged from the said two hundred thirty four pounds, wherewith they have above charged themselves, nor ought they to have allowance of any surplus, because as to the said several sums which they above suppose to have paid for the maintenance and cure of the poor to be kept and maintained by the said parish, the said *John Eagle* and *Daniel Franklyn* ought not to be allowed or discharged from the same several sums, because the said two pounds thirteen shillings and five pence, which the said *John Eagle* and *Daniel Franklyn* above supposed to have paid for the maintenance and cure of *William Emery*, the said *Joseph* and *John Andrews* say, that the said *John Eagle* and *Daniel Franklyn* ought not to be allowed or discharged from the said two pounds thirteen shillings and five pence, because they say, that the said *John Eagle* and *Daniel Franklyn* did not pay the said two pounds thirteen shillings and five pence, or any part thereof, in manner and form as the said *John* and *Daniel* have above alledged; and this they pray may be tried by the country; and the said *John Eagle* and *Daniel Franklyn* do likewise the same. And as to the said one pound and twelve shillings, which the said *John Eagle* and *Daniel Franklyn* above suppose to have paid for the maintenance and cure of *Mary Norton*, the said *Joseph Bishop* and *John Andrews*, say, that the said *John Eagle* and *Daniel Franklyn* ought not to be allowed or discharged from the said one pound and twelve shillings, because the said *Joseph Bishop* and *John Andrews* say, that the said *John Eagle* and *Daniel Franklyn* did not pay the said one pound and twelve shillings, or any part thereof, in manner and form, as the said *John Eagle* and *Daniel* have above alledged; and this they pray may be tried by the country, and the said *John Eagle* and *Daniel Franklyn* do likewise the same (the like separate issues, as to the three pounds fifteen shillings and six pence, to be paid for the maintenance of *Anne Bartholomew* and *Elizabeth Shorter*, and others mentioned in several other issues taken to the particular *Items* of the account.) And as the said twenty six pounds five shillings and six pence, which the

Account.

(P *60) the said *John Eagle* and *Daniel* above suppose to have rendered and restored back to the said Mr. *Gesque*, and also as to the said twenty pounds which the said *John* and *Daniel* above suppose to have rendered and satisfied to *Robert Clouds*, and also as to any allowance of the residue of the said surplus in the said plea of the said *John* and *Daniel*, mentioned to be made to the said *John* and *Daniel*, the said *Joseph Bishop* and *John Andrews* say, that the plea of the said *John* and *Daniel* is not sufficient in law to discharge the said *John Eagle* and *Daniel Franklyn* from the said several sums of twenty six pounds five shillings and six pence, and twenty pounds, and to cause any allowance to be made to the said *John* and *Daniel* of the residues of the said surplus, and that the said *Joseph* and *John Andrews* are under no necessity, nor by the laws of the land in any wise bound to make answer to the said plea pleaded in manner and form aforesaid, as to the said several sums of twenty six pounds five shillings and six pence, and twenty pounds, and to have any allowance of the said residue of the said surplus to be made to the said *John Eagle* and *Daniel Franklyn*; and this the said *Joseph* and *John* are ready to verify; wherefore, for want of a sufficient plea in that particular, the said *Joseph* and *John Andrews* pray judgment, and that the said *John Eagle* and *Daniel* may be charged with the said several sums of twenty six pounds five shillings and six pence, and twenty pounds, and that they the said *John* and *Daniel* may be excluded from any allowance of the said residue of the said surplus, and so forth. And the said *Joseph Bishop* and *John Andrews*, as to the said goods and chattels in the said declaration specified to have come to the hands of the said *John Eagle* and *Daniel Franklyn* (except the said surplice which the said *John Eagle* and *Daniel* above suppose to have been privately stolen) say, that the said goods and chattels are above the value of twenty shillings (to wit) of the value of fifty shillings; and this they pray may be tried by the country. And as to the said surplice, the said *Joseph* and *John Andrews* say, that the said surplice was not privately stolen away from them in manner and form as the said *John Eagle* and *Daniel* have above alledged; and this they likewise pray may be tried by the country, and the said *John Eagle* and *Daniel* pray likewise the same. And the said *John Eagle* and *Daniel*, or that the rendering and restoring back the said money to the said Mr. *Giesque* and *Robert Clouds*, was in law giving a good account of the same, and ought to be allowed as such in and upon the said account: And for that the said *John Eagle* and *Daniel* ought to have an allowance of the said surplus of the said account, in manner and form aforesaid, and have alledged sufficient matter in law to have such allowance; which they are ready to verify; and which the said *Joseph Bishop* and *John Andrews* do not in any wise deny, nor have in any wise answered thereto, the said *John Eagle* and *Daniel* as before, pray that they may have the said allowances in and upon the said account of the said several sums so as aforesaid rendered and restored, and that they may be discharged therefrom; and also, that they may have an allowance made to them

Readings and Observations, &c.

them in their account as to the said surplus, in manner and form aforesaid. And as to the said plea of the said *Joseph* and *John Andrews*, as to the value of the goods and chattels, (except the said surplice) the said *John Eagle* and *Daniel Franklyn* say, that the said plea of the said *John* and *Daniel* pleaded in manner and form aforesaid, is insufficient in law, to which they are under no necessity, nor by the laws of the land are bound to make any answer; and this they are ready to verify. And for causes of demurrer in law, the said *John Eagle* and *Daniel Franklyn* according to the form of the statute in that case made and provided, shew to this court the several matters following; that is to say. *Here set forth the causes of the demurrer.*

Readings and Observations on Cases in Account. *

(P *61)

AN *Action of Account* is to be brought against one who is liable to render an account in regard of his office, having received monies to the use of another, and refused to render an account thereof; and to maintain this action, there must be these three following circumstances incident to the case.

As *first*, The party to be sued must have no claim in the thing demanded to his own use; for if he has, this action does not lie against him.

Owen 36.

Secondly, There must be a privity between the parties, either by their consent, or a privity created by operation of law, as in case of a guardian; as where goods are delivered to a stranger to my use, or to be given over to me, there is no agreement between the parties; and for want of privity between me and the party that hath the goods, I cannot have this action of account: So if a man have a lease of a parsonage, and the defendant not being lessee, nor claiming

3 Lev. 24.

Owen. 36.

* The proceedings in this action being difficult, dilatory and expensive, it is now seldom used, especially if the party has other remedy as debt, covenant, case, or other action; or if the demand be of consequence and the matter of an intricate nature, for in such case it is more advisable to resort to a court of equity where matters of account are more commodiously adjusted and more advantageously determined for both parties, the plaintiff being in that court intitled to a discovery of books, papers and the defendant's oath. 1 Bac. Ab. 16. Tit. Account.

Readings and Observations on

Hutt. 36.
4 Leon. 2.
claiming any interest, takes the tithes when set forth, and carries them away, the lessor cannot have this action for want of privity; tho' true it is, that if H. receive my rents in my name, I may have an action of account against him; for my assent to his receiving it, makes privity, nor is he simply a wrong doer; for when he hath received my money, he hath not committed any wrong against me, because it is not my money till it is paid. But in the case of the crown, by reason of the prerogative, the law will supply a privity.

Thirdly, Where the person that delivereth the goods or money, hath taken no security for the same; for where the party hath taken security, the other person who hath the goods or money cannot be said to be possessed of such things, or that he received them to render an account of the profits; tho' if a bailiff doth receive money, and promises to pay it, the party who lets him have the money may have an account or *Assumpsit*; so that what is meant by a security, is not here meant of a bare right to another action, but such a security as the party may sue upon the security itself; for in some cases debt and account will lie for the same thing.

Fourthly, Where the party that hath the thing that is demanded, hath not only a bare oversight thereof, as a shepherd of sheep, or the like, but must have so far a property as to be able to change the same for the benefit of the bailor (which is the person whose money or goods they were) or at least to make advantage thereof, in order to render an account for the same. 11 Co. 93. *Dyer* 114. and 20. 277. *Bro. Account.* 81, 29.

In this action of account, the authorities in the books I shall insert under the following heads.

1. Where this action may or may not be brought, in respect to the thing prayed to be accounted for.

2. Against whom it may or may not be brought in respect to the person of the defendant.

(P *62) 3. Who may have this action of account in respect to the person of the plaintiff.

4. Where the defendant is to be charged as bailiff, receiver, or guardian, and the difference therein.

5. Of the proceedings in this action to the first judgment, and concerning the same.

6. What is or is not a good bar to the action.

7. Of the auditors in account their power and duty.

8. What shall be a good discharge before auditors.

Lastly. Of the second judgment and the other proceedings therein, that the parties may have justice according to the wisdom of the laws of England.

1. *Where*

Cases in Account.

1. Where this action may or may not be brought in respect of that thing to be accounted for.

1. If a man will enter upon my land upon any pretence to my use, and take the profits of it; for me, I may have this writ and charge him to account for it: So if a man will take up my rents as my bailiff, not being so appointed by me, I may have this writ, and charge him to account for them: But if a man enters upon my land as a disseisor, and keeps the possession of it, in this case it seems this writ will not lie. *Co. super Lit.* 89, 90. *Dyer* 277. 2 *Leonard* 92. *Amner & Luddington*, 3 *Leonard* 89. the same case. *The new Nat. Brew.* 266. Against one that receives another's rents.

2. If one devise that his executors shall sell his land, and out of the profits thereof, shall give such sum to me, in this case, and such like, where the money is to issue out of the land, I may have a remedy by this writ, and I need not sue for it as for a legacy. *Dyer* & per three justices. *Roll. Abr.* 116. For money devised to issue out of land, Devise of goods not delivered.

3. If a man gives me goods by his will, and his executor will not deliver them, I cannot recover them by this action. *Co.* 11. 89. for money levied by a sheriff by execution.

4. If a sheriff levy money on a *fiery facias* for me, and does not pay it me, I may have this action to recover it. 13 *H.* 7. 1. *Et per Curia in Communi Banco*, March f. 13. pl. 33. Or an action of debt. *Hob.* 206. *Speaker ver. Richards*. *Noy* 22. the same case only called *Spache* against *Richards*. *Moor.* 886 1 *Brow.* 51. the same case.

5. If a man delivers 10*l.* to merchandize, no account doth lie for the 10*l.* for this is certain, but for the profits thereof which are uncertain it doth lie; so it doth not lie for the arrears of a lease for years, or at will, because it is certain, for uncertain things lie only in accounts. *Bro. Account* 81. 8 *H.* 53. It lies not for things that are certain.

6. So rent alone lieth not in account, for this is a certain thing, and in the realty; but if a rent be mixed with other things, an account will lie for it. *Styles* 287. *Hamond against Ward* Lies not for rent alone, unless mixed with other things.

7. The defendant did by his deed, acknowledge the receipt of 100*l.* from the plaintiff, to be employed by him in merchandize, notwithstanding the covenant, that he might have an action of account, for the covenant did not change the case. *Bulst.* 2. 256. notwithstanding a covenant.

8. *A.* was indebted to the plaintiff 200*l.* the plaintiff required the defendant to receive it of *A.* and prayed the defendant to borrow so much for him, and pay it to the plaintiff. The defendant did borrow 200*l.* of *J. S.* and *A.* was bound for the repayment of it; and it was held, that the defendant must account for this money, for he received it by the direction of *A.* and of *J. S.* for *A. Harrington* and *Dean's Case*. *Moor*, Case 1184. fol. *Harrington ver. Dean*. For money received to my wife.

9. If

Readings and Observations on

Goods sent beyond sea. 9. If I deliver to another, goods or money beyond sea, to be delivered to me here again in *England*, at a certain place, and he deliver it not, I may be relieved by this action. *F. N. B.* 118. 9. *New N. B.* 271.

Whether by administrators. 10. If one receives money to bear an adventure to *Roan*, to bestow the same there in merchandizes, and then dies intestate, and administration is committed to *J. S.* in this action he might not at common law sue for relief, but an action of debt would lie for it. *Dyer* 20, 21. But now by the act of 4 and 5 of *Queen Anne*, cap.

An action of account lieth for and against executors, and for one jointenant against another.

(P * 63) * 11. If two joint merchants occupy their goods, stocks, and merchandizes in common, to their common profit, one of them may have this writ against the other, but then they must be both of them named merchants in the writs, *Co. super Lit.* 172. and a man could not have touched the King's land, or meddle with his goods, but he was liable to be questioned by this remedy, and to be called to an account in the exchequer, tho' not by this writ. *Co.* 11, 91. Yet see *1 Roll's Abridgment*: If two merchants have goods in common, one of them may not bring it against the other. 118.

Between joint merchants.

12. For accounts to the King and his accountants. See Stat. 4. *H. 6. cap. 2.* 7 *E. 6. cap. 1.* 6 *H. 4. cap. 3.* 1 *R. 3. cap. 4.* See prerogative of the King. *Co.* 11. 90. *Godb.* 289. 13 *Car. 2. cap. 3.* 14 *Car. 2. cap. 14.* 13 *Car. 2. cap. 13.* 13 & 14 *Car. 2. cap. 16.* 16 & 17 *Car. 2. cap. 6.* 19 *Car. 2. cap. 9.* 22 & 23 *Car. 2. cap. 23.* 2 *W. & M. cap. 11.* 4 & 5 *W. 3. cap. 11.* 5 & 6 *W. 3. cap. 23.* 6 & 7 *W. 3. cap. 9.* 7 & 8 *W. 3. cap. 8.* 11 & 12 *W. 3. cap. 8.* 1 *Ann. cap. 19.* 1 *Ann. cap. 20.* 1 *Ann. cap. 24.* 2 *Ann. cap. 17.* 9 *Ann. cap. 13.* 10 *Ann. cap. 8.* 1 *Geo. 1. cap. 24.* 1 *Geo. 1. cap. 35.* 3 *Geo. 1. cap. 17.* 4 *Geo. 1. cap. 9.* 5 *Geo. 1. cap. 14.*

2. Against whom it may or may not be brought, in respect to the person of the defendant.

Against husband for receipt by his wife. Body politick. Keeper of a park.

1. It lieth against the husband for the receipt of money by his wife, and against wife and husband for the receipt of money by the wife whilst she was sole, but it lieth not against a wife without her Husband. 4 *E. 4.* 25. *Bro. Account* 68. 82. *Dyer* 202.

2. It lieth against a body politick, as against any man. 19 *H.* 65.

It lieth against a servant that hath a command to receive for his Master. 19 *H.* 6. 5.

3. It lieth against the keeper of a park, that hath the charge of the deer as bailiff of his park. 10 *H.* 7. 6.

Against an executor or administrator.

4. At common law it might be brought against an executor or administrator, any other that meddled with the lands of the king in his case; but in the case of a common person, it did not lie against

an

Cases in Account.

an executor, or an administrator at common law; but by 4 & 5 *Anne*, it is now otherwise. *Lit.* 28. *Co.* 11. 84, 90.

Not against
an infant,
nor against
a disseisor,
nor against
a parish priest,
nor against
a parish
priest, nor
apprentice.

5. This action will not lie against an infant as bailiff or receiver. *Lit.* 28. *Co.* upon *Lit.* 172. Nor against a disseisor for the profits of the land, *Co.* 11. 89. *Co.* *Lit.* 72. Nor against a parish priest, for offerings without some agreement. *F. N. B.* 119. Nor against a parish a surveyor, or apprentice, (unless in the case hereafter, and other cases in the like nature) nor against a comptroller, reeve, or hayward, unless he can be charged as bailiff or receiver. 7 *New Nat.* B. 272.

6. It would lie for the grantee of the King against an executor at common law. 3 *Leon.* case 250. If the bailiff make a deputy, yet the writ shall be against himself. *F. N. B.* 119. b.

Against ex-
ecutor.
Bailiff
making a
deputy.
Money de-
livered to
B. to buy
cattle.

7. *Mich.* 15 *Eliz.* B. R. It was said by the whole court, that if A. deliver money to B. to buy cattle, or to merchandize with, although the money be sealed up in a bag, yet the property of the money is not in B. and cannot have an action for the money, but only an account against B. though he never buy the cattle or other things; for the auditors upon the account shall allow him the sum, and such other allowances as they shall think fit. And if C. take away the money after the death of B. or in his life-time, A. shall not have an action against the stranger, but the executors of B. or against B. himself, during his life: And therefore, if he who takes the money from B. promises A. to pay him the like sum of money as B. had received of him in his life, and as should be truly proved by A. action of the case will lie upon that promise. 3 *Leon.* case 62.

8. If one enter into land, claiming by devise where the land devised is entailed, and receive the profits, he may not be charged in an account. 1 *Leon.* 266.

Profits of
land entail-
ed. Against
a servant,
Against an
apprentice.

9. And tho' it hath been said that this action might lie against a servant, would not lie against an apprentice. *Goldsb.* 161. *Co.* 11, 89. Yet in some cases it will, as for instance,

10. *Hill.* 19 *Eliz.* B. R. *Rivers* and *Pudsey*. In account, the defendant said, that at the time, &c. and now he is the plaintiff's apprentice, and demanded judgment, &c. and it was held no plea; for although an apprentice may not be charged for this action for ordinary receipts upon his master's trade, yet upon collateral receipts, which do not concern the ordinary trade of his master, he shall be charged as well as another. *F. N. B.* 119. 8 E. 3. *Tit. Account* 94. 3 *Leon.* case 92.

11. If a tenant by *elegit* of my land do make waste upon the land, and hath received more than his due money; I may call him to account by this writ, 12 E. 3. 30. and * if there be two jointenants, or tenants in common of land, and the one of them doth make the other his bailiff of his moiety, and he will not answer him the profits,

Tenant
by *elegit*.
(P * 64)

Readings and Observations on

- fits, he may by this writ compel him to it. *Co. super Lit.* 172.
F. N. B. 118. *Roll's Abridg.* Account 117.
- Bailiff making a deputy.** 12. *A.* having a bailiwick, makes *B.* his under-bailiff to gather the amerciements; he shall have an account against him. 3 *E.* 3. 54.
- Guardian, bailiff, or receiver.** 13. It lieth against a man or woman guardian, bailiff or receiver, that is of age, and discoverd at the time, otherwise not. *Roll's Abridgment.* Account 117. *Co.* 1. 89. *F. N. B.* 119. 19 *H.* 6. 6. It may lie against the husband and wife. 18 *E.* 3. 35. *Pl.* 76. And though it laid against the guardian in socage, yet at common law it would not lie against the executors of such a guardian, but now otherwise by the act of 4 & 5 *Anne.*
- Against a woman.** 14. A man may have this action against a woman as receptrix, or against a chaplain, but not against an infant. 19 *H.* 6. 5. 3 *E.* 4. 40. 15 *E.* 4. 16. *contra.*
- Guardian of copyhold lands.** 15. This will not lie against a guardian that shall take the profits of my copyhold lands who am an infant. *Cro.* 3. fo. 229. *Hughes and Harris.* It may lie for woods, or underwoods, lands, rents, services, profits of courts, and the like. *Lib. Intr.* 21. *B. C.*
- 3 *Who may have this action of account in respect to the person of the plaintiff.*
- Partners.** 1. If two men be partners of merchandizes in one ship, and one of them makes a factor of all his merchandizes, in this case both of them may join in this writ, or have several writs against the factor. *Godb.* 90. *contra* in 1 *Brownl.* 26. there it is said, he only that delivered them shall have this action.
- Merchants.** 2. One merchant may have it against another merchant, where they occupy their merchandizes, and trade together. *F. N. B.* 117. *Co. Inst.* 1 part 272. Also one that is a lunatick, when he shall come to be of sound memory again, may have this writ. *Dyer* 25. *New N. B.* 267.
- Money received to my use.** 3. If one receive money of another to my use, or to pay over to me, and he do not pay it to me, I may have this action against him, and so may he that delivered the money to him. *Dyer* 22, 57. 18 *Ed.* 4. 23. Or an action of debt. *Godb.* 210.
- For the king against a debtor.** 4. It lies for the King against his debtor, or his executors, or tertenants, *Dyer* 25. And if any takes the goods of the King's debtor, which dies, the King shall have an account against him. *Co.* 21, 93.
- Sheriff or general receiver.** 5. A theriff accountable to the King, may have an account against his deputy sheriff, and one that is general receiver to *J. S.* over all *England*, that makes *J. L.* his deputy receiver in one county, the deputy is to account to the general receiver, for what the general receiver doth account. *Roll's Abr.* 118. *F. G.*

Cases in Account.

6. A recusant may not have this action for any thing that is seized Recusant.
in the King's hands. Stat. 3 Jac. cap. 5.

7. If a stranger takes the profits of my wife's land during our marriage, and I die, my executor, and not my wife, shall have this action for the profits. *F. N. B.* 119. For the profits of a wife's land.

8. The ward may have this writ against his guardian in focage, *Lit.* 124. *F. N. B.* The executor or administrator of the heir upon accounts to be made to the testator. Stat. 13 E. 1. cap. 23. *Dyer* 23. *Kelw.* 131. The succeeding against the preceding church-wardens. 8 E. 4. 6. Bro. Account 71. But the parishioners cannot bring it against the church-wardens. The heir in ward.

9. But some hold, that the heir in ward to the guardian in focage, may not sue the guardian till he be twenty-one years old. See *Cro.* 1. fol. 131. *Dyer* 137. 18 E. 3. 55. 29 E. 3. 5. *Doct. & Stud.* 14. *Old. N. B.* 91. *Gliston and Gulston*, 2. But this is not law. *Coke Instit.* 1. part 89.

10. This writ will lie for executors or administrators, and ex-For and
ecutors of executors, *West.* 2. cap. 23. 25 E. 3. cap. 5. 31 E. 5. against ex-
cap. 11. And now the act of the amendment of the law, in the 4th
and 5th of Queen Anne, it will be against executors.

11. If one deliver goods to deliver to me an infant, at my full Infant.
age, in this case when I am of age, I may recover them of him in
this action, or in detinue at my choice. *Fitz.* Detinue 53.

12. A legacy was given to a feme covert, the husband and A legacy.
wife gave one a letter of attorney to receive it of the executor,
who did receive it to the use of the wife; she and her husband died,
and the administrators of the husband brought an account, and it
was held it might well lie, and so would it have been, if he alone (P *65)
had made the letter of attorney. *Goldsb.* 158.

13. If the mortgagee, after the payment of the money by the Mortgage
mortgager, deliver him the money again, the mortgagee may reco- money.
ver it by this action, adjudged *Mich.* 4 *Eliz.*

14. If two be adjudged to account, and a *Ca. & exfa.* issue, Two ad-
and one appears, and the other be outlawed, he that appears shall judged to
account alone, for that the plaintiff's process is determined against account,
the other. And so if one die, the other shall account alone; and one appears
if one be adjudged to account, and will not, he shall be committed and the
to the Fleet. 1 *Brownl.* 25. other out-
law'd joint
tenants.

15. When there are two joint-tenants of a wood, and one sells
all, and takes all the money, the other might not have this action
against him at common law; but now, by the statute of the 4 and 5
of Queen Anne 'tis otherwise.

16. If one joint-tenant, or tenant in common, makes his compa-Joint-te-
nion his bailiff of his part, he may have this action against him; nant, and
and if one joint-tenant, or tenant of goods in common, deliver them tenant in
to a stranger, he alone must have the action. Co. 11, 89. *New.*
Nat. Br. 118.

Readings and Observations on

4. *Where the defendant is to be charged as bailiff, receiver, or guardian, and the difference therein.*

When as
bailiff. 1. And he that brings this action must take heed that he charge the defendant in a proper manner, as the case is; as bailiff, receiver, or guardian. If he be bailiff, the writ must charge him so; if receiver, he must name him such; and if both, the writ must charge him so. Where the things, of which a man doth receive the profits (whether it be land or goods) be uncertain, as a manor, hundred, or the like, that may be improved, there he shall be charged as bailiff; but where the things (be it profits of court, forfeitures, issues, fines, amerciaments) be certain, there he shall be charged as receiver. 9 E. 4. 40. 2 Bulstr. 277.

What is a
quailiff. 2. By bailiff we understand a servant that hath had the administration or charge of lands, goods, or chattels, to make the best benefit thereof for the owner; so an action will lie against a bailiff, not only for what he hath, but also for what he might have had and made by his industry, his reasonable charges allowed; and by this writ one may charge any one as receiver that hath received money, or other things for me, or to my use. Co. Lit. 271. 2 Leon. 245.

As bailiff. 3. If one charges me as bailiff of his goods *ad Merchandizandum*, in this case I must answer for the increase, and shall be punished for my negligence; but if he charge me as his receiver *ad Computandum*, I shall not be answerable but for the bare money or thing which was delivered. Godb. 55. Co. Lit. 172. 3 Leon. case 311. 1 Cro. 82.

4 A bailiff shall have allowances upon his account, for what he disburses for his master, belonging to his office, as to pay his quitrent, or the like; or if he be robbed, or suffer loss by other means, without any default in him, it shall be allowed him upon his account; but if he pay his master's debts, or lay out any thing else not appertaining to his office, this will not be allowed him. Co. upon Litt. 172. 14 H. 7. 14. Plow. 14.

rdian
to be charg-
ed as bailiff. 5. If an heir sues his guardian for the profits of his lands, taken before he is fourteen years old, he must charge him as guardian; but if he sue him for taking of the profits after this age, there he must sue him as bailiff; and if the heir sues a stranger that doth intermeddle with his lands, he must charge him as guardian. New Nat. Br. 270. Dyer 137. Bro. Account 30.

Against
guardian as
bailiff. 6. An infant was admitted to sue an account against his guardian in socage, for the profits received after the infant came to be fourteen year old, and the action was brought against him as bailiff. Cro. 2. Fol. 219. Anonymus.

As bailiff. 7. If I deliver another wares to sell, and he sells them to divers persons, and receives the money, here he is to be charged as bailiff, not as receiver. 4 H. 6. 27. Bro. Account 8, 53.

Cases in Account.

8. If one becomes my bailiff of his own wrong, without my commandment, he is accountable to me, but I am not compellable to make him any allowance for his expences about my business; and if I assign to such bailiff, of his own wrong, an auditor, he cannot make allowance of such expences. 1 Leon. 229. Case 301. A receiver.

9. A receiver of money is not compellable to make adventure, for fear of loss; and therefore, if he makes oath that he did not find any thing that he dared to buy, for fear of loss, the plaintiff shall be bound to receive his principal sum; for if he had loss, the master is bound to sustain it. 46 Ed. 3. Bro. Account 66.

*10. If I deliver a tun of wine, or a last of herrings to sell, and the bailiff sells them, I shall not have an action of account against him for the money, as receiver, for as such he would have no allowance of costs for his labour, but I may have account against him as bailiff. 43 E. 3. 21. 46 E. 3. 9. 4 H. 6. 27. 1 Roll's Abr. 118.

11. And a bailiff shall have an allowance of casual things of common course, paid or done by him without any command, as for relief, but not for other casual payments, if he has not a special command. 41 E. 3. 33. Bailiff.

5. Of the proceedings in this action to the first judgment, and concerning the same.

1. The process in an account at common law was *summons, pone*, and distress, and upon a *Nichill* returned upon the *summons, pone* on distress, an outlawry laid, and the process is to be returned from fifteen days to fifteen days; and in which action essoin lies, 15 Jac. in the common pleas. *Brownlow*, 1 Part, 24. and by the statute of *Marlbridge* a *Capias* is given in account.

2. In an action upon account there are two judgments; the first judgment is, that the defendant shall account; and because he hath not accounted before, in this first judgment the plaintiff shall not recover costs or damages, but a *Capias ad Computandum* only shall issue; and if a *Non est Inventus* shall be returned thereupon, then an exigent will lie: And when the defendant is by rigour of law imprisoned, yet the court, in favour of him, doth take bail, for he shall account before auditors, which the court shall appoint, and he shall appear from day to day before the auditors, until the account shall be determined; and before the auditors the plaintiff or defendant may join issue, or demur upon the plea pleaded before the auditors. And if any of the parties shall make default, and shall not appear, then if after appearance the defendant shall not plead, or if he shall join issue, or join in demurrer, the auditors shall certify that to the court, and the court shall proceed to trial of the issue, if the issue be joined, or by arguing the demurrer, as the cause shall require: And if the plaintiff shall make default, or shall

(P*66)
Receiver.

Bailiff.

Of the first judgments.
A capias ad computandum to go. Of bail to be taken. To appear before the auditors.

Auditors to certify to the court.

Readings and Observations on

- shall not prosecute ; or if the defendant shall not answer, the court may commit him to the Fleet ; and if verdict pass for the plaintiff, costs and damages shall be recovered, and the plaintiff shall recover his goods or monies demanded, with his costs and damages, and *Fieri Facias, Elegit,* or *Capias ad Satisfaciendum* shall be awarded ; and if a *Non est Inventus* be returned, then an outlawry after judgment, or an action of debt. 15 *Jac. in Co. B.* See *Brownlow*, 1 Part, 24, 25. 2 *Cro* 234. 11. *Co. Metcalf's* case.
- Of verdict. 3. After the first judgment, there can be no abatement for any cause, but a discontinuance, or non-suit may be.
- A *capias* ad satisfaciendum. 4. No writ of error can be had 'till the second judgment is given. 11 *Co.* 40. *Metcalf's* case. *Palmer* 2.
- No abatement. 5. After a trial upon issue, *Plene Computavit*, the plaintiff moved for a new trial ; the court came into it, for that the first judgment could be no less than that he should account. But *Twissden contra* ; for here he hath owned he was to account, and the judgment now shall be final. 3 *Keb.* 805.
- No writ of error. 6. *Mich.* 29. 30 *Eliz. C. B.* It was agreed by the whole court, and affirmed by the prothonotaries, that if in an action the defendant be adjudged to account, and be taken by a *Capias ad Computandum*, and set to mainprize, pending the account before the auditors, and doth not keep his day before them, that a *Capias ad Computandum de novo* shall issue forth against him. 1 *Leon.* Fol. 87. case 109.
- When judgment to be final. 7. The defendant, as receiver, cannot wage his law where he is charged to have received monies by the hands of another ; otherwise, where he received it, of plaintiff or his wife. 1 *Cro.* 919. *Goodrick's* case.
- When a *Capias* ad computandum de novo shall issue. 8. The substance of a declaration in account against receiver is, that the defendant be properly charged. As to the time, it is not necessary, that the plaintiff should be particular therein, nor as to the quantum of the money, but it is necessary, that the plaintiff set forth by whose hands the defendant received it. 3 *Keble* 425.
- Of wager of law. 9. And it may not here be improper to mention when it shall be said to be received by another's hands.
- How to declare. 10. If the defendant receives the money by the hands of the plaintiff's wife, it is not by another's hand, but by the hands of himself. 43 *E.* 2. 33.
- Of receiving by another's hands. (P *67) 11. So a man may declare of a receipt by the hands of the defendant. 15 *E.* 4. 16.
- Monies received by the hands of testator. 12. If an executor brings an action of account for the monies received from the testator, he must declare of monies received by the hands of the testator. 43 *E.* 3. 33.
- By the hands of plaintiff and a stranger. 13. He may declare of a receipt by the hands of two strangers, 43 *E.* 3, 33. but he can't declare of monies received by the hands of the plaintiff and a stranger ; for this requires two issues. 43 *E.* 3. 33.

Cases in Account.

14. But this I apprehend must be meant, that you can't join them in one entire count, but sure you may put them in one declaration by several counts. By church-wardens where wrong.

15. Declaration by church-wardens against their predecessors, and charged them with *bona Ecclesie*; and held ill; whereas it should have been *bona Parochianorum*. 2 *Keb.* 675. 1 *Ven.* 8. 1 *Mod.* 65.

Cases concerning the process. 1 *Rol. Abr.* 117. *Pl.* 1. 4. 118 *Pl.* 1. 52. *H.* 3. *cap.* 17. 2 *Inf.* 135, 136. *Co. Lit.* 89. *F. N. B.* 118. *Br. Account* 86. *Fitz. Account* 120. *Vide Kekw.* 131. *Fitz. Abr.* 151. *Stat. of Westm.* 2. *cap.* 23. 2 *Inf.* 404. *Co. Ent.* 47. *N.* 3. *Rast. Ent.* 21. *Stat. of Westm.* 1. *cap.* 47. 2 *Inf.* 259, 260. *Co. Lit.* 90.

2 *Inf.* 380. *Westm. cap.* 11. *F. N. B.* 114. *C.* 119. *F. Vide Reg.* 138. 3 *Co.* 12. *S. P. Vide Godb.* 24. 52 *H.* 3. *cap.* 23. 2 *Inf.* 144. *Co. lit.* 89. *F. N. B.* 117 *H. Reg.* 136, 137. 13 *Ed.* 3. *cap.* 11. 2 *Inf.* 379, 380. *Reg.* 138.

Cases concerning the proceedings after judgment to account. *Fitz. Account* 65. *Br. Exigent* 21. 1 *Rol. Abr.* 131. *Pl.* 4. *Cro. Eliz.* 19. 1 *Rol. Rep.* 84. *Br. Account* 27, 37, 63. *Cro. Eliz.* 636. *S. P. Br. Accounts* 33, 40. 1 *Brownl.* 25. *Hill.* 43. *Eliz. Cro. Eliz.* 806.

6 What is or is not a good bar to the action.

1 Some pleas are in bar of the account, and some in discharge before auditors; and some pleas will be allowed before auditors, that will not be allowed in bar of the account. As to the account, the defendant may plead *Ne unques son receiver ou bailiff pur account render*, or that he was sued for the same cause, and adjudged to account; and error brought upon the first judgment in another court where it is depending, and the like. *Dyer* 21. *Co.* 11, 8, 9. *E.* 4. 50. And as to his discharge before auditors, he may plead (if he be not a receiver) he was robbed, or that he hath fully accounted with the plaintiff himself, or the like. *Co.* 4, 84. 5 *E.* 4. 5. And if a new action of debt be brought for the arrearages found against the bailiff or the receiver, (as it may) the defendant may plead *Nil debet*, or wage his law. *Co.* 6. 53. *Stat.* 5 *H.* 4. 8. That he was robbed.

2. If a defendant be charged as receiver by indenture, he shall not be admitted to plead he never was receiver. 1 *Brownl.* 26. Nil debet. That he never was receiver.

3. It is a good plea in account, that he was robbed of these goods, and of others of his own. *Mo. case* 650. Payment of part to the plaintiff, and of part to *B.* by his commandment are good pleas before the auditors, without any deed. *Jenk. cent.* 2 *Cases* 25. That he was robbed.

4. Writ

Readings and Observations on

Writ of privilege brought,

4. Writ of privilege may be pleaded, and shall be allowed after the judgment *quod Computet. Western* against *Weilds. 2 Leonard 68. Quære*, whether this is law? For the party hath been guilty of laches, in not taking advantage before the judgment: and as this plea can't be pleaded after imparlance, it seems to me, this writ ought not to be allowed after judgment.

5. Not having pleaded it in bar, he hath lost the benefit of such discharge. *2 Cro. 234. Bro. and Roll. Tit. Account.*

And for that I apprehend it would take up too much room in this treatise of account, to particularize every plea that hath been held good or insufficient in bar of the account, I shall here insert only a few cases, and refer you to the books for the rest.

6. That he never was bailiff is the general bar. *21 Ed. 3. 60.*

7. It is a good bar, by claiming a legal property in the things to be accounted for; as to say, that the plaintiff demised the tenements for life. *29 E. 3. 47. 12 H. 4. 182.*

8. So that the plaintiff gave him the money. *30 of H. 6.*

(P *68) 9. And what will be a good bar in account, must show, that the defendant was never accountable, and therefore a retainer to pay his own debt, by the consent of the plaintiff, is not a good bar. *12 H. 4. 18. 14 H. 4. 20. b.* but is a good discharge before auditors, for that he gave the plaintiff twenty pieces of cloth in satisfaction, is not a good bar. *30 E. 3. 4. b. 1 Roll's Abr. 123. Pl. 3. 20 H. 6. 55. b.*

10. It is a good plea, that they had submitted to an award, for that is as strong as a release. *Cro. Car. 116. Hetley 114.*

As to the rest, see *49 E. 3. 7. 2 Leon. 194, 195. Godb. 55, 56, 57. 14 H. 4. 21. 7 H. 14. b. 12 H. 4. 18. 14 H. 4. 20. b. 12 H. 4. 18. 19 H. 6. 5, b. Bul. 277. 1 Mod. 65. 2 Keble 675, 704. 1 Ventris 88. 1 Roll's 393. Stiles 410. 1 Keb. 491. Br. Accompt. 47, 69. 30 H. 6. 5, b. 29 E. 3. 20. 9 E. 4. 16, b. 2 R. 2. Accompt 45. 5 H. 5. 5. 3 E. 31, b. 29 E. 3. 28. 26 E. 3. 76. 30 E. 3. 1, b. 1 Saund. 50. Latch 59. Raym. 57. 19 R. 2. Account 50. 21 Ed. 6. 16 Ed. 3. Account 52. 21 H. 7. 34. 22 H. 6. 55, b. 14 E. 3. 72. 1 Brownlow 24. 1 Roll's Abr. 122. 9 Ed. 4. 46. Cro. Car. 116. Telv. 202. 30 Ed. 3. 4, b.*

7. Of the auditors, their power and duty.

Differences between auditors appointed by the court, and those elected by the party. That one

1. The auditors are persons either chosen and assigned by the party, or otherwise appointed by the court, to audit the accounts between party and party: And there is a great deal of difference between the two auditors, (*Ex. gr.*) As to those assigned by the party, the statute of *Westminster 2. cap. 11.* concerning servants, bailiffs, &c. enacted, That where masters of servants assign auditors to take the account, and upon such account the servants are found

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found in arrearages, allowing what ought to be allowed, their body only cannot shall be arrested, and by the testimony of the auditors of the same be assigned. account, be sent or delivered to the next gaol, &c.

2. This is *quasi* a commission to such persons to audit, &c. So that one only cannot be assigned. 2 *Inst.* 380. By this act, the auditors are judges of the record. *Ibid.* The master may be found in arrear, but he can't be imprisoned by the auditors. 2 *Inst.* 280.

3. And in the account, the auditors must allow the bailiff his reasonable allowances and expences; and if the auditors refuse so to do, or charge him with more than he hath received, his next friend may have a writ out of Chancery, called *Ex parte talis*, which is directed to the Sheriff, to bring his body into the Exchequer, before the Barons there, with four *mainpernors*, to account before them at a certain day; but this extends not to auditors assigned by the court. 2 *Inst.* 381.

4. Where a man is adjudged to account, the court assigns the auditors. *Fitz. Account* 73. When auditors are assigned, and a day given to the defendant to account before them, if the defendant would have that day enlarged, the auditors must do it, because it is within their authority. *Williams and Lee.* 1 *Mod.* 42. *Rast.* 15, b. 16, a. But if the auditors can't compleat the account by the day appointed, they must apply to the court to have their time enlarged. *Rast.* 14. And if any of the parties make default, it must be certified to the court. 1 *Brownl.* 25.

5. If I make J. S. my auditor, generally, to take accounts of all my bailiffs and receivers, yet he is not a sufficient auditor without a patent; but if a bailiff or receiver be accountable to me, I may appoint one to be my auditor, to take the account of him, *Pro hac vice*, by Word. *Leon.* 1. Case 301. But if he afterwards takes an account of any, by force or colour of the said warrant, without my commandment, he is not a sufficient auditor to such intent, either to take the account, or to assess the arrearages, if the accountant be found in arrear, or to make allowance, if he be found in surplufage. *Leon.* 1 part, case 301.

Cases concerning the allowance of surplufage.

3 *Keb.* 362. *Mich.* 12. *Jac.* 1. *Roll's Rep.* 87. *Palm.* 512. *Br. Account* 62. 1 *Leon.* 219. 2 *Bulst.* 277, 278. *S. C.* 1 *Roll.* *Abr.* 599. *Pl.* 11. *S. C.*

8. What is or is not a good discharge before auditors.

1. A plea before auditors must not be repugnant to his first plea; That it is as where there is a plea, that the defendant never was receiver, it must not. is an ill plea before auditors to plead, That *Francis T.* the son and heir of the plaintiff, was bound to him in 400l. that *Vavafor* (by whose

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(P *69) whose hands the defendant is charged to have received *1201. to the use of the plaintiff) paid him in discharge of those bonds, and that he delivered the bonds to the use of the plaintiff, because he hath denied that he received the monies, to render an account; and this is contrary to the verdict. 1. *Cro.* 836.

2. The defendant pleads, that before the account, the plaintiff, of his own wrong, imprisoned the defendant, and assigned auditors to him, being in prison; and so the account was made by dures of imprisonment, and held a good plea, *Leon.* 1. case 17.

Dures of imprisonment.

3. Payment by the appointment of the plaintiff is no good plea before auditors, where the issue is *ne unques receiver*. *Hutton* 133. — *Ancient demesne* is a plea in it. *Co.* 5. 105.

What is a good discharge before auditors. 4. What is a good discharge before auditors need not be so strict as a plea in bar, for it need be no more than what will show, that though the plaintiff was once accountable, yet that he ought not now so to be.

That he was robbed. 5. It is a good discharge before auditors, that he was robbed, without defaultor negligence. *Co. Litt.* 89. 2 *Mod.* 100. *Mo.* 46. 4 *Co.* 84.

That the defendant gave a bond.

6. It is a good discharge to say, that the defendant gave a bond, or entered into a statute to the plaintiff, for so much, which was the money received; and that he gave him so much in satisfaction of the profits. 30 *Ed.* 3. 4. 1 *Roll's Abr.* Title Account 125. Pl. 11. 123. Pl. 4.

What a good discharge for a factor.

7. It is not a good discharge for a factor to say, that the goods were *bona peritura*, and therefore that he sold them upon credit, otherwise they would have been spoiled. 1 *Bulstr.* 101. For a factor can't sell upon credit, without a special commission to do.

What held a good issue.

8. An action of account against *Cheeke*, who held stakes upon a wager; there was a judgment, *quod Computet*, and he pleads in discharge before auditors, that he delivered the money to the other that won the wager. The plaintiff replies, that there was foul play, and not according to the articles; held, that the issue was well joined. *Bainton and Cheeke. Sti.* 353. Tho' the plea before the auditors was clearly an ill plea.

What is not a good discharge before auditors.

9. A plea before the auditors, that he received the money to deliver over to another, and that he did so, was held to be an ill plea before auditors, though it had been a good bar of the account. *Kirk and Lucas. Sti.* 430. But if it had been pleaded in bar, it must have been pleaded without a traverse; or if any traverse had been taken, it must have been without that, that he was his receiver in any other manner; for a traverse without that, that he received it to make an account any otherwise than in this manner, was held ill. 2 *Brownl.* 308. *Rutlage* against *Clark*.

10. The auditors are made the Judges of the account, and 'tis in their breast to give time to the parties. *Sti.* 464. *Le Gay*.

11. Where two persons are adjudged jointly to account, if one discharges

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discharges himself upon the account, it shall be a discharge to the other; and if he be charged by the account, it shall be a charge upon the other. 1 *Roll's Ab.* 173. *Pl.* 3.

12. I shall observe the same method as to the discharge before auditors, as I did in pleas in bar; and therefore, what shall be a good discharge, and what not.

See *Palm.* 512. 1 *Leon.* 219. 1 *Roll. Abr.* 2. *Pl.* 5. 2. *Rot.* Other cases concerning discharges before auditors.
Abr. 567. *Pl.* 2. *Br. Account* 10. *S. C.* 9 *E.* 4. 406. *Br. Accounts* 55. *S. C.* *Fitz.* 11. *S. C. Co. Litt.* 89. 2 *Mod.* 100. *S. P. Co. Litt.* 89. *S. P. Moor* 46. 2. *S. P. per Pop.* 4 *Co.* 84. 2 *Keb.* 761. 1 *Roll's Abr.* 2. *Pl.* 4. 46 *E.* 3. *Accompt* 40. 2 *Mod.* 101. 1 *Bulf.* 104. *Mich.* 9 *Car.* *B. R.* *Intratur Mich.* 8. *Rot.* 186. 41 *E.* 3. *Account* 33 *Curia* 1 *Leon.* 219. *S. P.* 41 *E.* 3. 9. *b.* 1. *Brownl.* 25. *Fitz. Account* 23. *S. C. Br.* 10. *S. C. Br. Account* 66. 1 *Rot. Abr.* 123. *Pl.* 3. *S. C.* 30 *E.* 3. 4. *b.* 23. 2 *Rich.* 2. *Account* 45. 2 *Leon.* 196. *Godb.* 58. *Dyer* 21. *S. P.* 6 *Rich.* 2. *Account* 47. 1 *Rot. Abr.* 124. *Pl.* 4. *Br. Account* 66. *S. C.* *Hut.* 133. *Stil.* 410. *S. P.* 430. *S. P.* 3 *Eliz.* 196. *b.* 43. *Stil.* 358. *Trin.* 39 *Eliz.* *B. R.* *Br. Account* 79. 41 *E.* 3. 4. 2 *Mod.* 100. *Latch* 59. *Yelv.* 202. 1 *Bulf.* 103. 104. *Pasch.* 40. *Eliz.* *Cro. Eliz.* 830. *Trin.* 4. *Car.* *Cro. Car.* 116. *Het.* 114. *S. C.* 115. *Richardson.* *Raymond* 57. *Mich.* 14 *Car.* 2. 1 *Keb.* 354. 395. *S. C. Trin.* 28 *Car.* 2. 2 *Mod.* 100. 1 *Bulf.* 102. *S. P.* 1 *Luff.* 101.

Ow. 28. *S. P. Cro. Jac.* 178. *S. P.* 2 *Leon.* 46. *S. P. Br. Account* 26. *S. C.* *Fitz. Account* 27. *S. C. Br.* 26. *S. C.* 42 *E.* 3. 6. 25. 42 *E.* 3. 24. *Fitz. Account* 21. *S. C. Br.* 31. 12 *H.* 4. 18. 13 *Rich.* 2. *Account* 51. *Br. Account* 13. *S. P.* 6 *Rich.* 2. 47.

1 *Brownl.* 25. *S. P.* 41 *Edw.* 3. 3. 1 *Syd.* 159. 1 *Keb.* 577. *Fitz. Account* 23. *S. C.* *Er.* 10. *S. C. Moor* 188. *Pl.* 335. 2 *Leon.* 76. 41 *Edw.* 3. 13.

*Lastly, of the second judgment, and the other proceedings (P *70) therein, that the parties may have justice according to the wisdom of the laws of England.

1. The second judgment is to charge the defendant to pay to the plaintiff what the auditors have adjudged is due upon the account. So it is said in the 19th of *H. 6. Pl.*

2. In account, the second judgment only is reversed, and a *Capias ad Computandum* shall issue against the defendant, to bring him to account upon the first judgment. *Hill.* 43 *Eliz. Cro. Eliz.* 806.

3. If a man be found in arrearages upon his account, and the party plaintiff do arrest him in London for those arrearages, then he may sue a writ in Chancery, directed unto the Sheriff, rehearsing the whole matter, commanding the Sheriff to detain and keep him in prison until he hath satisfied and paid such arrears; this must be understood of an account of debt. And though a man brings an action

Of the second judgment, to pay the money.

If judgment reversed by error,

To detain and keep the defendant quousque.

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action of debt for the arrears of the account before auditors, and hath the party arrested, yet he hath liberty to answer thereto. 19 H. 6. 4. *F. New Natura Brev.* 270.

If he pleads against him, he shall be awarded to the Fleet *Instantaner*. 39 E. 3. 35. But if Scire Facias. the plaintiff there leaves him without accounting, he may have a Defendant Scire Facias against the plaintiff; and if the plaintiff does not come dismissed. at the day, the defendant shall be dismissed, and thereby the plaintiff Judgment according to the writ also. 18 E. 2. *Br. Account* 123. 1 H. 71. But if he will the account. not account, the plaintiff may pray judgment according to the account. 14 E. 3. *B. Account* 109.

Plea, never was bailiff. Judgment. 5. *W. sued W.* in account as his bailiff, to his damage of one hundred pounds; the defendant pleaded he never was his bailiff; it was found against him, and judgment given, that he should render an account, and at the day the defendant made default; then the judgment was *Ideo consideratum est per Curiam quod querens recuperet versus predictum defendentem* 40l. 10s. upon this a writ of error was brought by the defendant, for that the court had given judgment of the value without enquiring of the value; and two Justices held, that the judgment must be given of what the plaintiff had counted. P. 19 *Jac. Winch* 5.

Where subject to two actions. 6. If money be delivered by *A.* to *B.* to be delivered to *C.* *B.* will be subject to two actions of account conditionally. *Hob.* 36.

Money delivered to the servants of another for relief of plaintiff. 7. *A.* gave 100l. for the relief of *A.* and *C.* *dum sola fuit*, and delivered the same to *J. W.* who was servant to one *Mountford*, to deliver to *R.* the plaintiff, for the relief of the said *B.* and *C.* and he in account before auditors shewed, that he had spent the said 100l. for the maintenance and relief of the said *A.* and *C.* and it was found against him, and the plaintiff had judgment, notwithstanding these following exceptions. *Cro.* 1 Fe. 82. *Robsert and Andrews* & ux. & al' *Lut.* 47. the same case.

Charged as receiver. Bailee could have no other writ. First, That he was charged to be receiver to account, whereas he received it for their relief.

Second, That he was not accountable, unless he had not expended it in their maintenance, therefore that the plaintiff should have declared specially, but held good; for they to whose use the bailment was made, could have no other writ. 1 *Cro.* 83.

Received by the hands of Wafe, who was only a servant to M. He had only the possession for a particular purpose. Third, That he is supposed to have received it by the hands of *Wafe*; whereas the jury found that *Wafe* was only servant to one *Mountford*, but answered, that where the servant doth contract, that shall be said to be the contract of the master; but where the servant, as in this case, conveys only a possession, and it could not be for his master's benefit or injury, there he shall not be in any wise considered as a servant to *Mountford*.

Fourth,

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- Fourth, That he is said to be accountable on request, and agreed, No request. no request was mentioned at the time of the delivery of the money. Request is implied by law.
- Fifth, The writ of account brought in *Norfolk*, and the *Capias* That the *ad Computandum* was awarded in *London*; — held, *Capias* was awarded in a wrong place.
- Sixth, That the verdict did not say that he had not expended the 100*l.* or any part thereof, but good notwithstanding, as That he had not said, it is collateral to the issue; otherwise not, as in waste for not said, twenty oaks, there the defendant must have said, that he did that the defendant had not cut down twenty oaks, or any of them, but in *debt upon not expen- a bond, that he shall not do waste; and breach assigned, ded any that he cut down twenty oaks; it is enough to plead, that part thereof he did not cut the said twenty oaks without saying, (P *71) or any of them.
- Seventh, It does not appear that there is any original; held well No origi- enough; for the plaintiff in error having not assigned the nal. want of an original, and the defendant having pleaded in *Nullo est Erratum*, the defendant cannot after alledge diminution; and this error being assigned *dehors* the record, the court may write to the common Bench to certify it. Damages recovered.
- Eighth, That the plaintiff had judgment to recover damages and costs, whereas it is a positive law he shall have none in a writ of account, but answered that he has them not *ratione detentionis Computi*, but *ratione interplacitationis Computi*, and a writ of account is one of the writs mentioned in *Magna Charta*, wherein damages are appointed.

8. It is said, that damages are not recoverable in account against a bailiff or receiver, but that must be understood only *pro detentionis Computi*. *Jenkins cent.* Cases 23. yet see 3 *Leon.* case 99. and in book of Entries 17. where damages were given. 2 *H.* 7. 13. 10 *H.* 6. 18. 21 *H.* 6. 2. *Fitz. Account* 4. But in *Mich.* 29 *Eliz.* where not. *B. R.* it was held, that the plaintiff should not recover damages expressly, but that the court should give *quoddam incrementum* to the amount of the arrearages. 3 *Leon.* case 238. Stat. 13 *Eliz. cap.* 4. 39 *Eliz. cap.* 7. *Moore*, case 847. *Cro.* 1 *Fo.* 821. *Robert* and *Andrews*, it was held, that damages shall be given in account *ratione interplacitationis computi*, but for the pleading, proceeding and judgment in this action, see much more in *Roll's Abridgment*, Account 123, L, M, N, O.

9. A judgment in account, as receiver, is no bar to an action of account as bailiff. 2 *Lev.* 127. But a bailiff cannot be charged as receiver, nor a receiver as bailiff, because that he might be twice charged. 1 *Roll's Abr.* 118. *H. Pl.* 1. 3.

10. The execution in this action against a bailiff is by *Levari Facias*, or *Fieri Facias*, within the year; after a *Scire Facias*, also *Capias ad satisfaciendum* and *Elegit*; and if he be in arrear he may be committed by the auditors. Co. 3. 12. 33 *H.* 6. 49. *Westm.* 2. cap.

Of the several executions.

Readings and Observations, &c.

2. *cap.* 18. 11. 45. *Co.* 8. 119. And so it is against a receiver, and the same execution is against the guardian in socage, but the accountant to the king is to be imprisoned, and all his goods and lands to be in execution. *Coke* 3. 12. *Dyer* 234. See more in *Moore*, Cases 1188. *Crook.* 1, 2, 3. *Godb.* 43. *Dyer* 202. *Orwen* 20. *Winch* 5. *Dyer.* 265. *Brownlow* 1. 25. *Bulstrode* 1. 103, 2. 256. *Dyer* 25, 151, 196. The statute of *Marlebridge*, *cap.* 23, 52 *H.* 3. *Westm.* 2. *cap.* 11. 13 *E.* 1.

Account
against husband
and wife. And
of the judgment.

11. Account was brought by husband and wife, executrix of *J. S.* to render an account as bailiff to *J. S.* *ex quacunque causa* & *contractu ad utilitatem* of *J. S.* and one *W. P.* *de quibusdam Merchandis* of the said *J. S.* of the third part of 38 tuns of wine, which the defendant and *J. S.* occupied to their common profits, and were committed to the defendant's hands by assent of *J. S.* and *W. P.* for their common profits, the defendant pleaded *ne unques receiver*, and it was found against him, and moved in arrest of judgment, that he was charged as general bailiff; whereas it is approved he was bailiff *ex quacunque causa*; they demanded a third part of the goods, or an account of them, and the other ought to have been joined in the account, but the court was against the defendant in both points; and it was held. 1. That he might demand an account of the third part. 2. That he might have the account alone, without joining his companion with him. 3. That being brought by the husband and wife as executrix, was well brought. *Crook* 2. *Fo.* 410. *Dr. Hackwell.* and *Estman's Case*, 1 *Roll. Rep.* 421.

Account by
administrator
or durante
Minori
Ætate.

12. In *Wells* and *Some's Case*, *M.* 7 *Car. B. R.* Account was brought by an administrator *durante minori Ætate* of the defendant, as bailiff of a manor, found for the plaintiff; and it was not shewed that the infant was within the age of seventeen, yet it was held good, and said, it shall be intended, unless it be shewed he was above seventeen years. 3 *Crook.* *Fo.* 240.

13. An action brought upon account for several sums, the defendant pleads, that as to all except ten pounds *ne unques receiver*, upon which issue was joined, and the plaintiff had a verdict; held in arrest of judgment, to be an immaterial issue; and *venire de novo* was awarded. *Pendarvis* against *Darwks.* *Sti.* 105.

Against
administratrix.

14. Account against administratrix; judgment *quod computet*; she dies; husband brought a writ of error; held that it would not lie, because the plaintiff would then be without remedy; *scire facias* lies against the executor, and he shall account. *Sti.* 290.

(P *72)

*15 The defendant was adjudged to account, and a *capias* issued against him *ad computandum*; he appeared before auditors at a day certain, and entered into account, and the auditors assigned them to appear at another day; at which day the plaintiff did not proceed

References to precedents in Account.

ceed; and it was held there could not be a nonsuit in this case, for it is after judgment, but a discontinuance only shall be entered; and if the plaintiff will after proceed, he may have a *scire facias* Where no upon this record *ad computandum*. Crook. 1 Part Fo. 19. Anony- nonsuit.
mus.

References to precedents in Account.

C O U R T against a receiver by other hands. Win. Entr. f 1. 6.

The like Ro. Entr. 122. by the hands of the plaintiff and another. Br. R. 2. Br. Red. 7. 8. 1 Bro. 116.

Against a bailiff and receiver of lands and tenements, rents and profits of all the estate of the plaintiff, both real and personal. Re. Dec. 1.

By the royal African company against one as bailiff and receiver to their company in London. B. 2. R. f. 1.

Against a bailiff and receiver. Tho. 96. Cl. Aff. 51. 53. 54. Read's Dec. 4.

Against a bailiff only to render an account. Tho. ibid. Ro. Entr. 4. Rob. 23.

Upon an infimul computasset. Ro. Entr. 5. 120, 121. with satisfaction of part. Ibid.

The like for part, and a mutuatus for residue. Idem. 122.

By a surviving administrator (with the will annexed) against a bailiff of goods, and receiver of foreign money. Vid. Entr. 75. Rob. Entr. 121.

Against four defendants, where two are outlawed. Ro. Entr. 5.

Against a bailiff, as well for the profits arising from the office of constable of a castle, as for the custody of all foresters, parkers, warreners, and of other places belonging to the same office, by the hands of another to merchandize and make profit thereof for the plaintiff. Br. R. 3. 1 Bro. 118.

By a husband and wife against a bailiff of the messuage and lands, and receiver to his wife when sole. Br. R. 6. Idem 9.

For an infant by his next friend against a bailiff. 1 Bro. 114, 118.

Against a receiver of money received to be paid to servants for their salaries. Bro. Red. 7.

Against a receiver upon a writing. Ro. Entr. 119. To be laid out to the benefit of the plaintiff for rent arrear. Ro. Entr. 120.

Against

References to precedents in Account.

Against a receiver of divers goods and chattels, equally to be divided between the plaintiff and defendant. Bro. R. 6.

By executor against a bailiff of goods. Vid. Entr. 76. The like against a bailiff, receiver, or factor beyond sea. Ro. Entr. 4. The like against a bailiff having the care and administration of divers goods to merchandize. Ibid. 123. 2 Bro. 38. Bro. R. 9. 11. Cl. Aff. 59. Red. Dec. 3.

By a feme sole, by her guardian against a receiver, for the profits of three parts of a ship, which belonged to the plaintiff and his brother deceased. Ro. Entr. 115.

For money lent to render an account. Ro. Entr. 120.

Account against an attorney. Ibid.

Receiver by bill for money received at one day. Ibid. Win. Entr. 1.

Bar in Account.

Against defendant, as receiver of tithes, by the hands of A R. knight, defendant pleads that he was not receiver, and the jury brought a special verdict, that R. was indebted to H. in 200l. and H. appointed D. a receiver, and requested D. to borrow 200l. for him of A. to pay H. and D. and R. became bound to J. for the said 200l. Afterwards D. appointed his wife to pay H. the said 200l. so borrowed; and if that be a receipt by the hands of the defendant, the jury doubted; adjudged for D. Win. f. 6.

(P *73) That he never was receiver, and judgment against defendant by *Nil dicit*, that he should account; Auditors were assigned by the court; divers issues upon that account, and demurrer to the demand, and *Nil dicit* thereupon, and confession to four others; and the jury find that the defendant had disbursed 78l. which is 18l. more than the plaintiff demands by his account, and so the plaintiff had no cause of action; as in Ridaway's case. Win. Entr. f. 1. Cl. Aff. 79. Ro. Entr. 120. Han. 165. Pl. Gen. 212.

Defendant own'd himself to be bailiff to the plaintiff, and had the care and management of the merchandizes in the declaration; judgment, that he should account, and an account was made before auditors. Cl. Aff. 58, 59, 60.

That he rendered a full account before auditors, and a demurrer thereto. Vid. 78. The like with replications and issues, thereon. Br. R. 5, 6. Cl. Aff. 52, 56, 57, 115. Ro. Entr. 122, 123. Pl. Gen. 213, 214. 1. Bro. 117. San. 105. Han. 105.

That after an account made up, he paid such a sum. Han. 204, 205.

Confessed and avoided by rendering a final account. Han. 105.

No such account. Pl. Gen. 212.

That

References to precedents in Account.

That he was never bailiff. Han. 83, 105. Cl. Aff. 83, 123, 824. Pl. Gen. 112. Ro. Entr. 4. 1 Bro. 114, 116. Ro. Entr. 4, 5, 115. Read. Decl. 23. 2 Bro. 38. Vid. 76. Bro. R. 9.

That he did not account before the auditors. Han. 104.

Defendant in account against receiver, after waging law, and an essoin thereupon, pleaded that he never was receiver per Patriam. 2 Town. Judg. 17. Ro. Entr. 120. Win. Ent. 7.

That the defendant was bailiff to the plaintiff, by which he received monies; and traverse, that he was receiver, to render an account. Replication, that the defendant was receiver prout, &c. and issue thereupon. Br. R. 2, 3.

That the defendant was receiver to the plaintiff at another time than in the declaration, and that for that time he accounted before auditors, and traverse the time in the declaration. Replication by maintaining the declaration, and issue thereupon. Br. R. 7.

Against a defendant, as receiver of a sum of money on a certain day for the plaintiff, by the hands of H. Bar, protesting he never was receiver, but was a common carrier, and received the money to be paid to J. to whom the defendant paid it, and an issue thereupon. Br. R. 8.

The plaintiff in protesting that he did not receive the money, for plea said, that the defendant had not paid it, as alleged in his plea. Rejoinder, that he paid it, and issue thereupon. Cl. Aff. 55.

Account for goods that they came to the hands of the defendant, who pleads, that no goods came to his hands. 1 San. 100. Replication, that a silver chalice came to his hands.

Defendant pleads, that he laid out the monies in reparations, and other necessary charges. 1 San. 45.

That the defendant received the goods of the plaintiff to merchandize, and was robbed. Replication, that he was not robbed. Ro. Entr. 123. and issue. The like plea before auditors, of money received, to be carried from one place to another. Ro. Entr. 119.

That the defendant received 100l. to lay out in traffick, and made a just account in writing, by which the plaintiff had gained 26l. per cent. which the defendant offered to pay, and is yet ready, &c. Ro. Entr. 119.

Of two sums received at two certain days. As to the money received the first day, the plaintiff and one M. were partners in merchandizing, and that he received the money to pay it to M. to whom he did pay it. The like plea to the second sum received. Replication, protesting that the plaintiff and M. were not partners, for plea, that the defendant did not pay. Br. R. 8. Rejoinder and issue, that he did pay.

To a count by a merchant against his factor, as bailiff of the goods, to merchandize and make profit thereof for the plaintiff. Bar, by the custom of merchant adventurers upon loss of merchandizes

References to precedents in Account.

dizes. Replication, by a traverse of the custom. Rejoinder, and issue upon the traverse. Br. R. 9, 10.

Protest, &c. for plea, that as to part, that the plaintiff was indebted to the defendant in 120l. and requested him to pay to J. for the plaintiff 358l. and at that time the plaintiff delivered to the defendant part of the goods to sell, and the money arising therefrom to retain a part towards payment of the said 478l. The defendant sold the goods for 386l which he retained. And as to the residue, pleaded a foreign attachment. Br. R. 11.

That the plaintiff discharged the auditors from auditing the account. Replication, that he did not discharge, and issue. Han. Ent. 104. Pl. Gen. 213

Bar by pleading infancy in account. Replication, that he was at full age. Bro. Vad. 465.

Bar by the statute of limitations. Replication, that the account concerned the trade of merchandize. Vid. 76.

*74) The defendant prays an allowance of the payment of money and expences; prays also an allowance of the surplusage; the plaintiff confesseth part of the allowance; and as to the residue says, that the defendant did neither pay or deliver prout, &c. And issue joined thereupon. 2 Bro. 40

Pleas of discharge before auditors.

As to 23l of 100l. that he paid the plaintiff. The like plea as to 17l. thereof, and as to 63l. the residue, he paid A. by the plaintiff's appointment. Replication, that he did not pay, and three several issues. Br. R. 4

That he paid money for carrying of cloth. An allowance thereof by the plaintiff. Bro. 10.

Upon a judgment, that the defendant should account. Auditors assigned by the court, by the assent of the plaintiff, who appointed a day. Bail for the defendant, who at the day delivered the account to the auditors, and prayed an allowance thereof, viz. for money, for meat, drink, washing and lodging, and other things expended and paid for the plaintiff. Replication, that the defendant did not pay, and issue. 1. Bro. 115.

Upon a judgment to account, auditors are assigned, who appoint a day. Bail for the defendant. Auditors reported to the court, that 'twas a difficult account. A day further is given to the auditors, they deliver their account into court, which follows in these words, &c. defendant prays an allowance of the money paid and expended. Replication as to part, the plaintiff's allowance; as to the rest, non solvit. 2 Bro. 38.

Account was made, and by the auditors delivered into court, which follows in these words, &c. Defendant discharges himself

References to Precedents in Account.

self of the money received, and pleads a general release in discharge. Special demurrer thereto. 1 Bro. 117.

Upon a judgment to account, defendant surrenders himself, and is committed to the marshal. Auditors assigned, who appointed a day. Bail for the defendant. Auditors produced the account in court, the tenor whereof follows in these words, &c. Defendant pleads several payments, for which he prays an allowance. Replication as to all, that he did not pay, &c. and several issues. Ven Fa. awarded. Half to be Englishmen, and half foreigners. Ro. Entr. 116.

The Defendant acknowledges the action, and auditors are assigned, who deliver the account into court, by which the defendant charges himself with the money received for the goods sold, and prays an allowance out of the money, part thereof the plaintiff allowed, and the other part disallowed. An issue thereupon; and for the residue, the defendant pleaded the custom of merchant adventurers upon loss of merchandizes. Replication by protestation, &c. and traverses the custom; Issue thereupon. Br. R. 9.

Defendant, upon a judgment to account, is taken upon a Ca. Sa. and committed to the Fleet. Auditors assigned, who prefix a day. Bail for the defendant. Account was made in these words, &c. Defendant is convicted of 100l. Bar, that he paid 37l. thereof to the plaintiff, and 63l. residue paid to A. by plaintiff's appointment. Replication, that he did not pay it; and a Venire Facias awarded. Br. R. 3, 4.

Defendant was convicted of 100l. received by the hands of G. 100l. by T. and 20l. by J.—Bar, that he paid 70l. to A. and T. and 50l. to P. by the appointment of the plaintiff. The like plea of 11l. and 6l. paid. And as to the residue, that the plaintiff was indebted to J. in 100l. and J. also indebted to defendant; and the plaintiff and defendant agreed, that the defendant should retain 100l. which he retained by plaintiff's appointment. Replication, that he did not pay the said several sums; and as to the 100l. did not retain it by plaintiff's appointment. Issue thereupon. Ro. Entr. 116.

And as to 5l. demanded by the defendant for labour, about the administration of the goods: The auditors are respited until issue should be tried between the parties. Br. R. 10.

That he fully accounted for part. Acknowledged the action for part, and denied that he was receiver as to the residue. Cl. Ass. 56. Judgment that the defendant should account. Idem 57.

The stile of an account from a guardian of the profits of a messuage. 1. Bro. 115. The like from a bailiff of goods received. 2 Bro. 39. The like of a receiver for the time, that he was receiver of the monies of the plaintiff. Ro. Entr. 116.

Audita Querela.

A U D I T A Q U E R E L A .

(P *75) P L E A S before our Sovereign Lord the King, at *Westminster*, of *Hilary* Term, in the sixth year of the Reign of our Sovereign Lord, *William* the third, King of *England*. Roll 309.

Writ of
audita
querela.

4. Mod.

306.

1 Salk. 262.

Carth. 282.

Ld. Raym.

27.

Judgment
recovered
against two
defendants.

England, OUR Sovereign Lord the King hath sent to his justices, (to wit.) assigned to hold pleas before himself, his Majesty's writ under the great seal of *England*, in these words; '*William* the third, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, King, defender of the faith, and so forth, to our justices assigned to hold pleas before us, greeting. We have received information, by the grievous complaint of *Anne Lampton*, widow, administratrix of the goods and chattels, which were the property of *Robert Lampton*, Esq; deceased, that whereas one *Lucas Collinwood*, not long since, (*that is to say*) in *Easter* term, in the thirty-fourth year of the reign of our predecessor *Charles* the second, late King of *England*, in the court of the said late king, before the king himself, by a judgment of the said court, had recovered against the said *Robert Lampton* and one *Edmond Craister*, in the county aforesaid, Esq; and *Robert Lampton*, of *Newnham*, in the aforesaid county, gent. four hundred pounds for a debt, and also forty shillings, which were in the same court adjudged to the said *Lucas*, for his damages which he had sustained, as well by occasion of detaining his said debt, as for his expences and costs by him laid out about his suit for recovery of the same, whereof they were convicted, as by the record and proceedings thereof, now remaining in our court before us at *Westminster*, may plainly appear: And afterwards the said *Robert*, in the life-time, of the said *Edmond*, (*that is to say*) on the first day of *November*, in the first year of the reign of our predecessor *James* the second, late King of *England*; and the said *Edmond* survived the said *Robert*, by whose death, and by the laws of *England*, the goods and chattels of the said *Robert*, at the time of his death in the hands of whatsoever administrator or administrators unadministered, became altogether discharged

Audita Querela.

discharged from the debt and damages aforesaid, as the same *Anne*,
 by whatsoever ways and means shall be thought most proper by
 this court, is ready to make appear: Nevertheless, the aforesaid
Lucas, contriving and intending unjustly to vex, and greatly to injure
 the said *Anne*, by colour of the judgment aforesaid, not long since,
 and after the death of the said *Robert* (*that is say*) in the term of
 the Holy Trinity, in the fifth year of our reign, and of our dear
 consort, the lady *Mary*, late Queen of England, the said *Lucas* pro-
 secuted out of our said court, before us and the said lady *Mary*,
 our late Queen, at *Westminster* our writ of *scire facias* against the
 said *Anne*, as administratrix of the goods and chattels of the said
Robert, of and upon the judgment aforesaid, directed to the then
 sheriffs of *London*, by which said writ reciting, that whereas the
 aforesaid *Lucas* heretofore, in the court of our said late predecessor,
 King *Charles* the second, before the King himself, by bill, without
 any writ of the said late king, and by the judgment of the same
 court, had recovered against the said *E. C.* otherwise called *E. C.*
 of *C.* in the county aforesaid, Esq; and the said *R. L.* otherwise
 called *R. L.* of *Newnham* in the county aforesaid, gent. the afore-
 said four hundred pounds for a debt, and also the aforesaid forty
 shillings, for his damages which he had sustained by occasion of
 detaining that debt, as also for his expences and costs by him laid
 out in carrying on his suit for a recovery of the same, whereof they
 were convicted, as appeareth of record, reciting also and suggest-
 ing, that the aforesaid *Edmond*, the second day of *July*, in the se-
 cond year of the reign of our said predecessor the late King *James*
 the second, died at *London* in the parish of the blessed *Mary* of
 the *Arches*, in the ward of *Cheap*, and the aforesaid *Robert* survived
 him: And that afterwards, (*to wit*) the first day of *April*, in the
 second year of the reign of our self, and our late Queen aforesaid,
 the aforesaid *Robert* died intestate at *London* aforesaid, in the parish
 and ward aforesaid; and that after his death, administration of
 all and singular the goods and chattels, rights and credits which
 were the property of the said *Robert* at the time of his death, were
 in due form of law granted to the said *Anne Lampton*, (the said
 debt and damages being then unsatisfied to the said *Lucas*) and
 that the aforesaid *Lucas* had implored us and our said late Queen,
 to grant him proper relief in that particular; and we, and our
 said late Queen, willing that whatsoever was just should be
 done in that case, we by the said writ therefore commanded the
 said sheriffs of *London*, that by honest and lawful men of their
 bailiwick, they should cause it to be known to the said *Anne*,
 that she was to have been before us and our said late Queen on
Tuesday next after fifteen days of the Holy Trinity, then next fol-
 lowing, to shew if she had or knew any cause why the said *Lucas*
 ought not to have his execution for the debt and damages afore-
 said, of the goods and chattels of the said *Robert* unadministered

(P *76)
 Scire facias
 sued out
 against ad-
 ministrators of the
 deceased.

Audita Querela.

' by the said *Anne*, if she thought proper so to do ; and further to do
 ' and receive whatsoever the said court, before us and our said late
 ' Queen, should then consider of, under the circumstances of the
 ' said case, and that then they should have there the names of
 ' those by whom they should so cause it to be known to her, and
 ' likewise that writ, *and so forth*, at which day came the said *Lucas*
 ' into our said court before us and our said late Queen at *Westminster*,
 ' in his proper person ; and the said sheriffs of *London* then returned
 ' to us and our said late Queen, that the said *Anne* had not any
 ' thing in their bailiwick, by which they could cause to be known
 ' unto her the purport of the said writ, nor was she to be found
 ' in the same, and the said *Anne* came not : Therefore, as before,
 ' the said sheriffs of *London* were by the same court commanded,
 ' that by honest and lawful men of their bailiwick, they should cause
 ' it to be known to the said *Anne*, that she was to be before us, and
 ' our said late Queen at *Westminster*, on *Tuesday* next after three
 ' weeks of the Holy Trinity then next * following, to shew cause in
 ' form aforesaid, *and so forth*, if *and so forth*, and further, *and so*
 ' *forth*, the same day was given to the said *Lucas*, by the same
 ' court, before us and our said late Queen, then to be there, *and so*
 ' *forth*, at which day came in his proper person, the said *Lucas* into
 ' the said court, before us and our said late Queen, and the said
 ' sheriffs of *London*, as before returned to us : That the said *Anne*
 ' had not any thing in their bailiwick, whereby, or by means where-
 ' of, they could make known unto her the purport of the said writ,
 ' nor was she to be found in the same ; and the said *Anne*, (altho'
 ' solemnly exacted) at the same day, came not, but made a default.
 ' Wherefore it was then and there considered by the said court,
 ' before us and our said late Queen, that the said *Lucas* should have
 ' an execution for the debt and damages aforesaid to be levied of
 ' the goods and chattels of the said *Robert*, at the time of his death
 ' unadminister'd by the said *Anne*, as by the records and proceed-
 ' ings thereof, now remaining in our court before us at *Westminster*
 ' may also plainly appear. And altho' the said *Anne* was never
 ' summoned in the aforesaid plea, by virtue of the said writ, to
 ' shew cause why the said *Lucas* ought not to have such execu-
 ' tion against her, nor hath she appeared in such plea. And altho'
 ' the said *Anne*, and her goods and chattels, ought not of right to
 ' have been chargeable to such execution, yet the said *Lucas* doth
 ' resolve and threaten, that by such execution, he will levy the
 ' debt and damages aforesaid, of the goods and chattels aforesaid,
 ' to the great damage and injury of the said *Anne* ; and contrary
 ' to the laws and customs of our kingdom of *England*. Wherefore
 ' in as much as the said *Anne* hath besought us to provide her pro-
 ' per relief in this case, we being unwilling that the said *Anne*
 ' should any ways be injured, and willing, that what is right and
 ' just should be done to her in this case, we command you, that
 ' in

Sheriff's
return a
Nichil.

An alias
scire facias,
awarded.

(P *77)

The sheriff
returns a
Nichil.

Execution
adjudged
upon the
scire facias
by default.

Altho' the
administra-
tor was ne-
ver sum-
moned to
shew cause,
nor ever
did appear.

The writ.
Gravamen.

Audita Querela.

* in order to hear the complaint of the said *Anne*, you call before
 * you the aforesaid parties, and such others, as it shall seem meet to
 * you to convene; and having heard the aforesaid parties and their
 * reasons, you cause to be done full and speedy justice to the said
 * parties, which of right, and according to the laws of our kingdom,
 * remaineth and ought to be done, *and so forth.*"

Afterwards (to wit) on *Wednesday* next after fifteen days of *St. The decla-*
Hillary, this same term, comes the said *Anne Lampton*, before our ration upon
 Sovereign Lord the King at *Westminster*, by *N. H.* her attorney, the writ.
 and saith, that the aforesaid *Lucas* ought not to have his executi-
 on against her for the debt and damages aforesaid, to be levied of
 the goods and chattels which were the property of the said *Robert*,
 at the time of his death, unadministered by the said *Anne*, because
 she saith that the said *Lucas* heretofore, that is to say, in *Easter*
 term, in the 34th year of the reign of our late Sovereign Lord King
Charles the second, in his then Majesty's Court of King's Bench,
 by a judgment of the same court (then go on) setting forth the
 recovery of the judgment in the King's Bench, the death of one of the
 defendants, the suing out a scire facias against the administrators of
 the deceased; that the defendant was summoned to shew cause, why
 there should not be execution against her, and the gravamen, as above
 in the writ, till you come to the words to the great damage and
 grievance of the said *Anne*, and contrary to the laws and customs
 of this kingdom of *England*, (then go on as followeth) and this the (P *78)
 same *Anne* is ready to verify. Wherefore she prayeth the judgment
 of this honourable court, and that the aforesaid *Lucas* may be pre-
 cluded from having any execution whatsoever, of and upon the re-
 covery aforesaid, to be levied of the goods and chattels of the said
Robert, unadministered by the said *Anne*; and that the said *Anne*
 may be restored to all things which she hath lost, and been de-
 prived of, by occasion of the award of the execution aforesaid, &c.
 And the aforesaid *Lucas* came here into court to have given an
 answer of and upon the premisses; but because the court of our
 Sovereign Lord the King now here before the King himself, know
 not whether the allegations of the said *Anne*, in this particular be
 true or not; therefore the sheriff of *Northumberland* is commanded
 to cause the said *Lucas* to come before our Sovereign Lord the
 King, from the day of *Easter* in fifteen days, wheresoever his
 Majesty shall then be in *England*, to make answer of and concern-
 ing the premisses, and further to do and receive whatsoever this
 honourable court should consider of, under the circumstances of this
 case; at which day comes the said *Anne* before our Sovereign Lord
 the King at *Westminster* by her said attorney; and the said *Lucas*
 (solemnly exacted) at the same day, comes likewise by *H. D.* his
 attorney, and saith; that the matter contained in the said writ, and
 declaration, is not sufficient in law, to compel the said *Lucas* to
 make any answer thereto, or to hinder his said execution from be-
 ing

Demurrer.

Audita Querela.

ing levied of the goods and chattels of the said *Robert*, at the time of his death, unadministered by the said *Anne*: To which the said *Lucas* is under no necessity, nor any ways bound by the law of the land to make answer; and this he is ready to verify; and therefore by reason of the defect of a sufficient writ of declaration in this cause, the said *Lucas* prayeth the judgment of this honourable court concerning the said writ and declaration, and that the same may be quashed.

Cres. Levine.

Joinder in
demurrer.

And the aforesaid *Anne* saith, that the aforesaid writ and declaration ought not to be quashed, because she saith, that the writ and declaration in this cause, and the matter contained therein, are good and sufficient in law, to preclude the said *Lucas* from having his execution against the said *Anne*, of and upon the judgment aforesaid, to be levied of the goods and chattels of the said *Robert*, unadministered by the said *Anne*, which said writ and declaration, and the matter therein contained, the said *Anne* is ready to verify and prove, as the court shall think fit. And because the said *Lucas* hath not answered to the said writ and declaration, nor yet any ways denied the matter therein contained, the said *Anne* as before, prayeth the judgment of this honourable court, and that the said *Lucas* may be precluded from having any execution whatsoever, of and upon the recovery aforesaid, to be levied of the goods and chattels of the said *Robert*, unadministered by the said *Anne*; and that all things whatsoever that she hath lost, or been deprived of, by occasion of the award of the execution aforesaid, may be restored to her. But

Continu-
ance.

(P *79)

because this court hath not yet considered what judgment to give, of and concerning the premises, a day therefore is given to the aforesaid parties, to appear before our Sovereign Lord the King, * from the day of the *Holy Trinity*, in three weeks wheresoever his Majesty shall then be in *England*, to hear the judgment of the court, of and concerning the premises, because the said court of our Sovereign Lord the King are not determined, *and so forth*; at which day come the aforesaid parties before our Sovereign Lord the King at *Westminster*, by their said attornies; whereupon all and singular the premises being viewed, and fully understood by this court, and upon mature deliberation thereupon had, in as much as it appeareth to the said court here, that the writ and declaration, aforesaid, and the matters therein contained are good and sufficient in law, to preclude the said *Lucas* from having his execution, of and upon the judgment aforesaid, against the said *Anne*, to be levied of the goods and chattels of the said *Robert*, unadministered by the said *Anne*. Therefore it is considered, that the aforesaid *Lucas* shall be precluded from having his said execution, of and upon the recovery aforesaid, to be levied of the goods and chattels of the said *Robert*, at the time of his death, unadministered by the said *Anne*; and that she the said *Anne*, shall be restored to all things, which she hath lost by occasion of the award of the Execution aforesaid, *and so forth*.

Jydgment.

And

Audita Querela.

And upon demurrer the question was, whether a writ of *audita Querela* would lie in this case, because, where the party may have any other remedy, this writ will not lie upon this reason, that if the administrator had not suffered judgment against her, by default in *the scire facias*, she might have prevented this matter. But by her neglect therein, she could not then have an *Audita Querela*. The case as in the book.

But the court were of a contrary opinion, upon the reason of *Sti. 231*, *Barcock* and *Thompson's* case, that the administrator shall have an *Audita Querela*, because she now hath no other remedy. 238,

Readings and Observations on Cases in Audita Querela.

AN *Audita Querela* (a) is in its nature a suit in equity, praying relief from a charge that is coming upon a person, either by a statute or judgment, or such like, which he ought not to bear, or to ease him of a charge already come upon him; as when a judgment is executed upon him, and his lands, goods, or chattles seized; and sometimes it is to pray the aid and assistance of a court of justice to compel some others, who of right ought to join in bearing the burthen with him. And as it is a command by the justices to do right to the party, therefore the law in this case does not require such strictness, as in other actions. 1 Bac. Ab. 193. 3 Bl. Com. 406. Finch L. 488. F. N. B. 103. 1 Com. 460

In treating upon which subject, I shall insert the cases in the books under the following heads.

1. By and against whom it must be brought.
2. In what cases this action will or will not lie, to relieve the plaintiff from an imprisonment, or some other grievance by means of erroneous process.
- * 3. Where it will lie, because the plaintiff in a suit or the conversee, in a statute hath discharged the plaintiff by matter of fact; as by release or otherwise, or by act in law, as by purchasing or surrendering part of the lands. (P *80)
4. Where it will lie, because the party suing is already satisfied.
5. Where

(a) The indulgence now shown by the courts, in granting a summary relief upon motion in cases of evident oppression has almost rendered useless the writ of *Audita Querela* and driven it quite out of practice. *Ld. Raym.* 439. 3 Bl. Com. 406.

Readings and Observations

5. Where it will lie to compel others to bear the burthen with the plaintiff.

6. At what time it must be brought.

7. And lastly, Of the procefs in this action.

1. *By and against whom it may be brought.*

Obligor
against obli-gee. 1. If an obligee hath an extent on lands and sells the same, and after releases to the obligor, the obligor may have this writ against the obligee; and so adjudged in *Flower's case*. (a) *B. R. p. 7. New Nat. Bre. 239.*

Against ter-tenant 2. This writ will lie against the ter-tenant, without naming of him party or privy. *F. N. B. 104. 12 Hen. 4. 16.*

For an infant. 3. It will not lie for an infant to relieve himself against a statute after he is of full age, but it must be brought during his minority. *Dyer 231.*

Where an infant shall or shall not have this writ. 4. And so adjudged in the following case, where an infant was bound in a statute staple for 600*l.* and was taken upon the statute in execution; and when he came at full age, he brought an *audita querela*, and held to be too late; and it was said by *Weston*, that if an infant bring an *audita querela* to avoid a statute, and before the trial, by inspection of the Justices he comes at full age, now by that the writ shall abate; and the Judges in the determining this cause, took this distinction between a fine and a recognizance, or a statute and a deed inrolled by an infant: for the last he may avoid at his full age, because nothing passes by the inrollment; but otherwise in a fine or statute; for at first all passes by matter of record; and therefore if the infant will not come while he is an infant, and apply to be relieved, he shall not afterwards; besides the Judges are supposed to, and they actually strictly do examine an infant, before they permit him to pass any thing by matter of record. *Moor 77. Worlesley's case.*

By the heir against assignee. 5. If the obligee obtains a judgment, and the land of the heir is extended, and the plaintiff assigns it over, and after the assignment releases to the heir. In this case he may have this action against the assignee, and without naming him who sued out the execution. *P. 7 Car. B. R. Adjudged Flower's case. M. 36 & 37 Eliz. C. B. Bul. 1. 140. New Nat. Brew. 236.*

Where it doth not lie for infant. 6. It doth not lie for an infant to be relieved against a judgment. *Moor 460.*

Release after trial. 7. If at the *nisi prius* a verdict be found against the defendant, and before the day in bank, the plaintiff releases to the defendant all actions and demands, and then prays judgment, the defendant may have this writ upon such release. *New Nat. Brew. 235.* for he cannot plead this, at the day in bank; and before judgment

On Cafes in Audita Querela.

ment he cannot have an *audita querela*. 9 Hen. 5. 1. *New Nat Brev.* 235.

8. If any thing in the obligation charges the heir, executor, or administrator unreasonably, and against the law, and no other remedy is to be had, then they may be relieved by this writ. *Co.* 5. ^{Heir or executor charged against reason.} 87. *Hob.* 58.

9. It will lie for the bail to discharge him, where the first judgment is satisfied, and the recognizance discharged. *Cro.* 2. 645. Judgment is had against three, and one of them is taken in execution, they may all join in this writ where they have a foundation to have it. 3 *Cro.* 443. ^{or bail.}

*10. J. S. and the defendant sued him, and got one A. an attorney, without his notice, as attorney to appear for him, and had judgment on a *non sum informatus*, and the defendant in execution; here this writ was not granted. But in this case 'twas said, he was to be relieved by a writ of *disceit* against the attorney, 2 *Cro.* 694. *F. N. B.* 105. A. P *81)

11. This writ lieth for the heir, as well as the conusor himself, and that before execution sued, and a *superfedeas*, but not for a stranger. *Co.* 3. 11. ^{Where it will not lie or procuring an attorney to appear for another.}

12. It is doubted whether a purchaser after an extent sued, and the land delivered, may have this writ; for none is to have it but the party grieved, and the extent being before this time, that he is not therefore to have it. *Cro.* 2. 227. ^{Whether a purchaser can have this writ after an extent.}

13. If a man be seized of Black-acre, and White-acre, and enter into a statute, and then makes a lease of White-acre for years, the reversion over in fee, and after the conusee purchaseth Black-acre, and extends the land of the lessee for years: he in remainder shall have this writ, or a *sci. fa.* for his relief; so he that hath but an *interesse termini*, as *cestuique use* had before the statute. *Marsh* 63, 69. ^{For him in remainder.}

14. If a statute or recognizance be ill taken, and after this the recognizor enfeoffs a stranger of the land, and the conusee sue execution, the feoffee may sue out this *audita querela*. ^{Where for feoffee.}

15. If one gets my land by a covenous suit, I may in some cases have relief by this action. *F. N. B. Audita querela.* *Co.* 8. 144. ^{Against a covenous suit.}

16. Where a man suffers by an administrator's discharge of a statute before a judgment, relief may be had by this writ. 1 *Cro.* 734, 822. 2 *Co.* 8. 144. *Dyer* 203. ^{Administrator's discharging a statute.}

17. If an administration be granted to one, and he sueth a debtor, and hath judgment, and after another covenously sueth out an administration, and he alone releaseth the debt to the debtor: who notwithstanding is taken in execution, he shall not have this writ to be relieved, for the release was void. *Co.* 6. 19. *Dyer* 339. ^{Where it will not lie against an administrator.}

18. It may lie for a tenant by *elegit* against another that had a former Tenant by *elegit*.

Readings and Observations

5. Where it will lie to compel others to bear the burthen with the plaintiff.

6. At what time it must be brought.

7. And lastly, Of the proceſs in this action.

1. By and againſt whom it may be brought.

Obligor
againſt obli-
gee.

1. If an obligee hath an extent on lands and ſells the ſame, and after releaſes to the obligor, the obligor may have this writ againſt the obligee; and ſo adjudged in *Flower's caſe*. (a) *B. R. p. 7. New Nat. Bre. 239.*

Againſt ter-
tenant

2. This writ will lie againſt the ter-tenant, without naming of him party or privy. *F. N. B. 104. 12 Hen. 4. 16.*

For an in-
fant.

3. It will not lie for an infant to relieve himſelf againſt a ſtatute after he is of full age, but it muſt be brought during his minority. *Dyer 231.*

Where an
infant ſhall
or ſhall not
have this
writ.

4. And ſo adjudged in the following caſe, where an infant was bound in a ſtatute ſtaple for 600*l.* and was taken upon the ſtatute in execution; and when he came at full age, he brought an *audita querela*, and held to be too late; and it was ſaid by *Weſton*, that if an infant bring an *audita querela* to avoid a ſtatute, and before the trial, by inſpection of the Juſtices he comes at full age, now by that the writ ſhall abate; and the Judges in the determining this cauſe, took this diſtinction between a fine and a recognizance, or a ſtatute and a deed inrolled by an infant: for the laſt he may avoid at his full age, becauſe nothing paſſes by the inrollment; but otherwiſe in a fine or ſtatute; for at firſt all paſſes by matter of record; and therefore if the infant will not come while he is an infant, and apply to be relieved, he ſhall not afterwards; beſides the Judges are ſuppoſed to, and they actually ſtrictly do examine an infant, before they permit him to paſs any thing by matter of record. *Moor 77. Worſley's caſe.*

By the heir
againſt af-
ſignee.

5. If the obligee obtains a judgment, and the land of the heir is extended, and the plaintiff aſſigns it over, and after the aſſignment releaſes to the heir. In this caſe he may have this action againſt the aſſignee, and without naming him who ſued out the execution. *P. 7 Car. B. R. Adjudged Flower's caſe. M. 36 & 37 Eliz. C. B. Bul. 1. 140. New Nat. Brew. 236.*

Where it
doth not lie
for infant.
Releaſe af-
ter trial.

6. It doth not lie for an infant to be relieved againſt a judgment. *Moor 460.*

7. If at the *niſi prius* a verdict be found againſt the defendant, and before the day in bank, the plaintiff releaſes to the defendant all actions and demands, and then prays judgment, the defendant may have this writ upon ſuch releaſe. *New Nat. Brew. 235.* for he cannot plead this, at the day in bank; and before judgment

(a) *Cro. Car. 214. 1 Ja. 228.*

On Cafes in Audita Querela.

ment he cannot have an *audita querela*. 9 Hen. 5. 1. New Nat. Brev. 235.

8. If any thing in the obligation charges the heir, executor, or administrator unreasonably, and against the law, and no other remedy is to be had, then they may be relieved by this writ. Co. 5. against reason. 87. Hob. 58.

9. It will lie for the bail to discharge him, where the first judgment is satisfied, and the recognizance discharged. Cro. 2. 645. Judgment is had against three, and one of them is taken in execution, they may all join in this writ where they have a foundation to have it. 3 Cro. 443.

10. J. S. and the defendant sued him, and got one A. an attorney, without his notice, as attorney to appear for him, and had judgment on a *non sum informatus*, and the defendant in execution; here this writ was not granted. But in this case 'twas said, he was to be relieved by a writ of *disceit* against the attorney, 2 Cro. 694. F. N. B. 105. A. (P *81)

11. This writ lieth for the heir, as well as the conusor himself, and that before execution sued, and a *superfedeas*, but not for a stranger. Co. 3. 11.

12. It is doubted whether a purchaser after an extent sued, and the land delivered, may have this writ; for none is to have it but the party grieved, and the extent being before this time, that he is not therefore to have it. Cro. 2. 227.

13. If a man be seized of Black-acre, and White-acre, and enter into a statute, and then makes a lease of White-acre for years, the reversion over in fee, and after the conusee purchaseth Black-acre, and extends the land of the lessee for years: he in remainder shall have this writ, or a *sci. fa.* for his relief; so he that hath but an *interesse termini*, as *cestuique use* had before the statute. Marsh 63, 69.

14. If a statute or recognizance be ill taken, and after this the recognizor enfeoffs a stranger of the land, and the conusee sue execution, the feoffee may sue out this *audita querela*. Where for feoffee.

15. If one gets my land by a covenous suit, I may in some cases have relief by this action. F. N. B. *Audita querela*. Co. 8. 144. Against a

16. Where a man suffers by an administrator's discharge of a covinous statute before a judgment, relief may be had by this writ. 1 Cro. 734, 822. 2 Co. 8. 144. Dyer 203.

17. If an administration be granted to one, and he sueth a debtor, and hath judgment, and after another covenously sueth out an administration, and he alone releaseth the debt to the debtor: who notwithstanding is taken in execution, he shall not have this writ to be relieved, for the release was void. Co. 6. 19. Dyer 339.

18. It may lie for a tenant by *elegit* against another that had a former Tenant by *elegit*.

Readings and Observations

former charge, for leaving out part of the land chargeable when he took execution. *And. 2 Pt. 170, 171.*

Against a
release.

19. If the defendant in a personal action do after judgment entered release to the plaintiff all actions personal, the defendant may not have this writ. *Co. Litt. 289.*

2. In what cases this action will or will not lie to relieve the plaintiff from an imprisonment, or some other grievance, by means of erroneous process.

Where defendant renders them-
ney an erroneous judgment

For bail on erroneous process.

Where bail was relieved from one judgment by another's being reversed against the principal

Where against the Sheriff for an escape.

(P * 82)

Where, for that the defendant was not summoned, and had a release to plead, not being summoned by the Sheriff on a *sci. facias*.

1. Where a party renders the full money in court, when he is in execution, he may have this writ for his enlargement. *1 Leon. 196.* So when an erroneous judgment is given against a bail or principal. *Stiles 288, 323, 324.*

2. It will also lie for the bail to avoid an execution against them, where no process hath been sued forth against the principal in his life-time, or there is error in the process against him. *Gold. 174.*

3. A judgment was had in the common bench in debt against the principal; the plaintiff sued the bail upon the recognizance and had judgment; the bail brought a writ of error in the King's Bench, where judgment is affirmed; the defendant brings a writ of error, and the first judgment was there reversed: the bail bring an *audita querela* there, and were discharged; for the reversal of the first judgment of course reversed the judgment upon the *sci. facias*. *2 Roll's 254. Green and Legris.*

*4. So where a Sheriff doth arrest one in execution, and doth not return the writ, but suffers him to escape, and upon an *alias capias* he doth arrest him again. *Moor, case 167.* An escape suffered by the Sheriff, is a discharge of the execution, and the plaintiff may have an *audita querela*, otherwise if it be with consent of the party. *Stiles 117. Moor 57.*

5. So where a *sci. fa.* goes against executors, and the Sheriff returns *nulla bona*, and upon a supposal of a waste, a new *sci. fa.* is sued out with a *fi. fa.* and upon two *Nichils*, judgment *de bonis propriis*: it was held, if one be condemned on two *Nichils* returned, and was never summoned, he may have this writ for his relief. *Stiles 372.* otherwise on a *sci. fa.* returned, the same is held to be law in the following case.

6. Upon a recovery in debt, if the plaintiff sues out a *sci. fa.* and the Sheriff returns *Nichil*, by which an execution is awarded, the defendant shall have an *audita querela*, if he has a release or acquittance, because he was not warned. But if the Sheriff returns him warned, he shall not have an *audita querela* upon such release, because he is supposed to have had an opportunity to plead the same, upon the return of the *sci. fa.* but his remedy must be against the Sheriff for a false return. *New Nat. Bre.*

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7. It lies not against the conusee, where the Sheriff hath taken the body on a statute merchant, and afterwards suffered him to escape, and the conusee sues out execution against the lands: for the escape of the conusor is no discharge of the lands from the execution upon a statute merchant. *1 And. 266.* But if the Sheriff permits the conusor to go at large by the consent of the conusee, then the whole execution is discharged, and the conusor shall have his lands again. *1 Leon. 313.*

8. Where a prisoner escapes against both the will of the Sheriff and the party, and the Sheriff takes him again, this writ will not lie, for the taking was lawful. *Co. 3. 44. 8. 141. Moor 257.*

9. *A.* recovered against *B.* who was outlawed and taken in execution by a *capias utlagatum*, and escaped, the outlawry was reversed; *A.* sued out execution, and it was held *B.* might not have this writ. *Co. 8. 141.*

10. If a widow of a copyholder in fee, that claims dower, by the custom of the manor, recovers the same in the Lord's court, and 50*l.* for damages, where in truth there is no such custom, and the recovery is erroneous, the party grieved may have this remedy. *Co. 4. 30.*

11. If one have a judgment against a Sheriff upon an escape, and after the first judgment from the execution whereof the escape was, is reversed for error; the Sheriff for his relief may have this writ, but not till it be reversed, tho' there be error in it. *Co. 8. 142.*

3. *Where a person may have it, because the plaintiff in a suit, or the conusee in a statute hath discharged the plaintiff by matter of fact; as by release or otherwise; or by act in law, as by purchasing or surrendering part of the lands.*

1. When a debt is released after verdict, or after judgment, or execution by the plaintiff in the suit, and the case is so, that the defendant hath not time, nor place to plead it; there regularly he must relieve himself by this writ. *3 Cro. 153.* But it must be a good and sufficient release in law, or else he cannot have this writ. *Bro. 37. Hob. 162.*

2. So in all cases where a judgment, or judgment and execution is had against one, and the plaintiff either makes a release, or the defendant be released by act of law, of a duty, or of any part of it, and yet the plaintiff sues out an execution, the defendant may have this writ. *36 H. 6. 24. Plow. 72. Dyer 286. 2 Cro. 337.*

*3. If after an extent, and an assignment of the extent, the conusee release to the conusor, the conusor may have this writ. *Cro. 3. (P. *83) 153.*

4. If one be in execution on a statute, and the conusee surrender any part of the lands extended, he may have this writ to discharge his body out of execution. *And. 1, 175.*

5. *A.* acknowledged

Where it will not lie because the sheriff took the defendant. Where a person outlawed, and the outlawry reversed. Upon an erroneous judgment in an inferior court. Where a sheriff may be relieved from a charge for an escape.

Where on a release.

On a release in deed, or in law. Where a conusee releases to the conusor. Where conusee surrenders part of the lands.

Readings and Observations

By purchasing part of the land.

5. *A.* acknowledged a statute to *B.* and after enfeoffed *B.* the conusee of part of his land, and after conveyed other part of his land to his son, and the wife of the son for a jointure for the wife, the conusee sued out execution: and in this case it was held, that the son alone may have this writ in his own name, and that the statute is defeated by purchasing part of the land. *Dyer* 193.

4. *Where it will lie because the party suing is already satisfied.*

For suing a second judgment after judgment and execution.

For suing one trespasser after satisfaction from another.

The heir and executor sued upon one bond.

Where one is sued twice for the same thing.

Where two lessees are sued separately for one breach of covenant

Where two obligors are sued jointly, escape, &c. of one will not discharge the other; but if separately otherwise. If one.

1. If one hath sued me for a debt, or other cause, and hath judgment against me to recover, and hath execution, and then sues me again for the same cause, and hath judgment and execution, I may have my remedy by this writ. 9 *E.* 4. 50. *Bro. Abr.* 77. b.

2. If the plaintiff has had satisfaction against one trespassor, and he proceeds to require it against another, that other person may have relief by this writ. *Hob.* 66. *Trin.* 3 *Jac. B. R.*

3. So if one bind himself and his heirs by specialty, and the obligee sues the heir, and recovers of him, and then afterwards the plaintiff sues the executors for the same cause, or after he hath sued the executors, will sue the heir for the same cause; the heir or executor may have relief reciprocal, as the case is, by this writ. *Plowd.* 439. *Bro.* 74.

4. So if one take goods from another to whom I delivered 'em, so that he is liable to both our suits, and one of us sue and recover against him, and then the other sue him, his remedy is by this writ. *Dyer* 233. 5 *H.* 7. 15.

5. If a lessee covenants for him and his assigns to repair, and the lessee assigns over, and the covenant is broken, and the lessor sues one of them, and recovers damages, and then sues the other, he may have this writ for his relief; so in like cases. *Bro. cap.* 74.

6. If two joint and several obligors be sued jointly, and both taken in execution, the death or escape of one will not discharge the other, or give him this action. *Hob.* 58. But if such obligors be sued severally; and once a satisfaction is had against one of them, or against the sheriff upon the escape of one of them, the other may have this writ. *Co.* 5. 87. *Godb.* 257. *Bulst.* 2. 97.

7. If a judgment be against three, and one of them is taken in execution, and afterwards set at large by the plaintiff's consent, if either of the other two be taken in execution upon this judgment, he shall be discharged by this writ. *Stiles* 387.

5. *Where it will lie to compel others to bear the burthen with the plaintiff.*

Where feoffee may have this

1. A man having land in two counties, entered into a statute, and then made two feoffments to *A.* and *B.* and an extent went against the lands of *B.* who afterwards levied a fine of it to *J. S.* who

On Cases in Audita Querela.

who brought this writ against *A.* the other feoffee. And it was held against another feoffee. it did not lie for him, for he is not the person grieved by the execution; for the land was charged when he bought it, & *transit cum onere*; yet a purchaser that comes *in for a valuable consideration, (P *84) shall not be charged to pay more than another, but every one of them *pro rata*; and a feoffee himself, the feoffee of the feoffee, and the twentieth feoffee may have this writ to be relieved against others. *Bul.* 2, 15, 16. *F. N. B.* 104.

2. If a recognizance be acknowledged by two, both their lands become chargeable, and execution shall be equally made; and if one should die, the creditor must bring a *scire facias* against his heir, and tertenants; for they being all in *æquali jure*, the charge doth not survive, but 'tis otherwise where the lands are not bound by specialty; as if two enter into a bond, and one dies before judgment, the survivor shall be charged alone. 4 *Mod.* 316.

3. It is to be brought sometimes against the prosecutor himself, and sometimes against him and others that ought to bear part of the burthen with him. *Kelv.* 25. 1 *Brow.* 38.

4. *R.* was bound in a recognizance of 1000 marks to *P.* and *C.* according to 23 *H.* 8. c. 6. and after *R.* and his wife by fine give to the conusee the fifth part of the manor of *B.* and other lands in the county of *York* in fee, after *P.* as survivor, sued out an execution of the recognizance in *London*, against *R.* and his body was taken; in this case it was held, the *audita querela* did not lie for him. *Plow.* 72.

6. At what time it must be brought.

1. After a suit is begun, and so far gone, that there is no time to plead a matter, then this writ may issue, but not till the judgment be had. *Fitz.* 13. But if one that is sued by the King, get a charter of pardon, or any release in the mean time, between the verdict and judgment; and after the judgment is had, there he may plead it after judgment, for he may not have this writ against the King. 11 *H.* 7. 10.

2. This writ may lie for one before he is ousted of his land by the execution, where he is in danger of it only. *Winch* 20, 23.

3. Where the plaintiff that sues as administrator, hath his letters of administration revoked, he must be relieved by this writ, for he cannot plead it. *Yelv.* 125. *Stiles* 417.

4. Where the party might have pleaded matter in discharge, and hath elapsed his time, he shall not be relieved by an *audita querela*.

5. Therefore where a release is made before verdict, the party shall not have an *audita querela*. 2 *Roll's Rep.* 128, *Salkill* and *Howard*.

6. If execution be sued upon a statute merchant or staple, an *audita*

References to Precedents

audita querela, lies upon the release by the plaintiff, because that he had not any day in court before to plead it. 1 *Roll's Abr.* 307.

7. So in trespass or other action; if a verdict be given for the plaintiff, and afterwards the plaintiff released to the defendant before the day in bank, and afterwards judgment is given for the plaintiff, the defendant shall have an *audita querela*, because he could not plead the release at the day in bank. 6 *R.* 2. 1 *Roll's Abr.* 307.

7. And lastly, of the process in this action.

1. The proper process on an *audita querela quia timet*, is a *venire*, and distress infinite, and not a *scire facias*. But where the party is in execution, there he may have either a *scire facias*, or a *venire*, 1 *Salk.* 92. So was it adjudged in an *anonymous* case, 1 *Salk.* 90. If an *audita querela* be founded on a record, or the party be in execution, the process upon it is a *scire facias*; but if it be grounded on a matter of fact, or the party be not in execution, the process is by *venire*. *Clerk against Moor.*

(P*85) *2. Where before execution this writ is brought by the party grieved himself, or by his heirs or executors, he surmising good cause of this writ, must give good bail to prosecute, and stand to the judgment of the court, upon which he may have a *superfedeas* to stay execution; but when the plaintiff is in prison, then it seems there is no bail put in, till the consuee or obligee answers in the *audita querela*. *Palm.* 422.

3. Note; the process before execution are *venire facias*, and *distingas*, and if he comes not to appear upon the *distingas*, (unless the sheriff returns *nihil habet* upon the *venire*,) then shall issue a *distingas*, *alias* and *plures* and upon a *nihil* returned on these processes, a *capias* shall issue.

4. After execution executed, no *superfedeas* doth lie; after execution a *scire facias* doth issue, and this peremptory.

5. The process before execution are a *venire facias*, and an *alias*, &c. and then if he comes not in, the use hath been that upon motion, the party in prison may be discharged. *Moor* 811.

6. After these processes a *distingas*, and upon default after appearance, and a plea pleaded a *distingas ad audiendum judicium*; for by such default judgment shall be given against him, and after execution the process is a *sci. fa.* when the party is in prison upon a *ca. sa.* 3 *Cro.* 364.

7. Where a man puts in bail in this action, he shall not be discharged of this bail, but must continue till the suit by *audita querela* be determined; for albeit the party do not prosecute after the appearance of the defendant, yet he must continue in prison, or stand upon his bail.

8. If a man be nonsuited in one *audita querela*, yet he may have another,

On Cases in Audita Querela.

another, but he shall have no *superfedeas* in the second, as he has in the first.

9. If an *audita querela* be brought before the execution of judgment *quod timet*, and it goes for the defendant, he shall execute his principal judgment; but if it be brought after the party is in execution, and he be bailed out, then the judgment being once executed, there can be no other resort to that, but the defendant shall proceed upon the record of the *audita querela*. 1 Vent. 264. Where to proceed on the record of *audita querela*.

10. An *audita querela* is no *superfedeas*, and therefore execution may be taken out unless a *superfedeas* be sued forth; and if the *audita querela* be founded on a deed, it must be proved in court before a *superfedeas* shall be granted. 1 Salk. 92. Where *audita querela* has no *superfedeas*.

11. If the party that brings an *audita querela* be out of prison, the court will bail him, tho' grounded upon a surmise of fact, a payment; but if he be in prison not, unless there be a specialt that he can shew. 1 Vent. 46. Bail.

12. Lands were extended upon a recognizance entered into by one that had lands in London and Middlesex; the feoffee of the land in Middlesex which had been extended, brought a *scire facias* by way of *audita querela* against the other feoffee of the lands in London, to pray an equal extent, but did not pray restitution and a equal extent; but held the writ might be brought in that manner, and that it was no ground for the quashing it, because it did not pray all that it might have had. Moor 536. *Very and Carew*. The writ not praying restitution.

References to Precedents in Audita Querela. (P *86)

Upon a Defeasance.

UPON a statute merchant unduly acknowledged and executed. Wi. Entr. 12. Ra. 98.

Against an executor upon a statute merchant, where there was defeasance upon performance of covenants in an indenture, which the plaintiff performed on his part, and on payment of the money at a certain day between the hours, and at a place in the same specified, which sum the plaintiff was ready and offered to pay. Wi. Entr. 14. Ra. 98.

Upon a judgment in the common bench, and a defeasance performed

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audita querela, lies upon the release by the plaintiff, because that he had not any day in court before to plead it. 1 *Roll's Abr.* 307.

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(P*85) *2. Where before execution this writ is brought by the party grieved himself, or by his heirs or executors, he surmising good cause of this writ, must give good bail to prosecute, and stand to the judgment of the court, upon which he may have a *superfedeas* to stay execution; but when the plaintiff is in prison, then it seems there is no bail put in, till the conusee or obligee answers in the *audita querela*. *Palm.* 422.

3. Note; the process before execution are *venire facias*, and *distingas*, and if he comes not to appear upon the *distingas*, (unless the sheriff returns *nihil habet* upon the *venire*,) then shall issue a *distingas*, *alias* and *plures* and upon a *nihil* returned on these processes, a *capias* shall issue.

4. After execution executed, no *superfedeas* doth lie; after execution a *scire facias* doth issue, and this peremptory.

5. The process before execution are a *venire facias*, and an *alias*, &c. and then if he comes not in, the use hath been that upon motion, the party in prison may be discharged. *Moor* 811.

6. After these processes a *distingas*, and upon default after appearance, and a plea pleaded a *distingas ad audiendum judicium*; for by such default judgment shall be given against him, and after execution the process is a *sci. fa.* when the party is in prison upon a *ca. fa.* 3 *Cro.* 364.

7. Where a man puts in bail in this action, he shall not be discharged of this bail, but must continue till the suit by *audita querela* be determined; for albeit the party do not prosecute after the appearance of the defendant, yet he must continue in prison, or stand upon his bail.

8. If a man be nonsuited in one *audita querela*, yet he may have another,

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another, but he shall have no *superfedeas* in the second, as he had in the first.

9. If an *audita querela* be brought before the execution of a judgment *quod timet*, and it goes for the defendant, he shall execute his principal judgment; but if it be brought after the party is in execution, and he be bailed out, then the judgment being once executed, there can be no other resort to that, but the defendant shall proceed upon the record of the *audita querela*. 1 *Vent.* 264. Where to proceed on the record of audita querela.

10. An *audita querela* is no *superfedeas*, and therefore execution may be taken out unless a *superfedeas* be sued forth; and if the *audita querela* be founded on a deed, it must be proved in court before a *superfedeas* shall be granted. 1 *Salk.* 92. Where audita quere-la no superfedeas.

11. If the party that brings an *audita querela* be out of prison, the court will bail him, tho' grounded upon a surmise of fact as payment; but if he be in prison not, unless there be a specialty that he can shew. 1 *Vent.* 46. Bail.

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Upon a judgment in the common bench, and a defeasance for performing

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performing covenants in an indenture, which the plaintiff performed on his part. Br. R. 122.

Brought upon a defeasance, or temporal release after judgment. Bro. Met. 60. Demurrer thereupon. Bro. Red. 122. Vet. Intr. 109. 1 Br. 41.

Upon a release, &c.

Upon a special release by way of covenant, made to the plaintiff upon a bond, entered into by him and two others; defendant obtained judgment thereupon against the plaintiff, for that he had not then the release in his hands, but was ignorant thereof. Demurrer Ro. Entr. 154. 1 Bro. 32.

For the heir of the conusor by his next friend upon a statute staple, acknowledged by the father, to which the plaintiff pleaded a release. Ro. Entr. 157. Thes. Br. 29.

Upon a release after judgment recovered in the King's Bench. Vid. 109. Thes. Br. 11, 12, 13.

By joint trespassors upon a release to his companions. Mo. Ent. 94.

Upon a release to a statute staple given to the plaintiff by the administrator of the conusee, who notwithstanding was sued to execution. 2 Bro. 50.

Upon a release to a judgment in debt recovered by one administrator, and given by another. Plea thereon. Ro. Entr. 159.

Against an executor, who prosecuted an elegit after the testator released the debt and damages. Bro. Met. 80.

Entry of an audita querela upon a release brought by one in prison. Mo. Entr. 92.

The like upon a suggestion of a release where the defendant was surety for the plaintiff upon a bond for performance of covenants. Bro. Met. 66.

Upon an award between the verdict and judgment, the defendant prosecuted the execution of the judgment, notwithstanding the performance of the award. Bro. Met. 57.

The plaintiff was taken in execution by the deceased, and by his consent was permitted to escape, and was again taken by the administrator. Ro. Entr. 161. Thes. Br. 10.

The like upon an escape by consent of the plaintiff, when the party was in execution. Mo. Entr. 91. Bro. Met. 52, 72. Thes. Br. 10.

The plaintiff and N. were sued upon a writing, whereupon judgment was obtained against them separately. N. was taken and permitted to go at large, notwithstanding the plaintiff by a Habeas Corpus cum causa, sued out by the defendant, was committed to the Fleet. Br. R. 127. Co. Entr. 615. 3 B. 21.

Upon

In Audita Querela.

Upon Nonage.

By infancy of the plaintiff, who acknowledged a recognizance in Chancery, where the plaintiff at first produced three witnesses. The court advised thereon, a sci. fa. was awarded, and it was directed to him to produce other proof of his age, who produced three other witnesses, with the register of the parish. Bro. Entr. 155.

The like where an infant plaintiff was bail, and in Woodstreet compter, and discharged. 2 Bro. 52.

**By the heir and tertenant.*

(P*87)

For a brother and heir upon a judgment recovered against the deceased, and satisfied by him in his life time, the defendant notwithstanding is prosecuting an execution against the plaintiff as heir, and tertenant. Vid. 102. Thes. Br. 29. Demurrer.

For a tertenant upon a judgment in debt extended upon the lands which were demised for life before the judgment given, and where other lands were omitted. Vid. 104. Bro. Red. 124.

The heir in aud. qu. says, that the lands purchased by his father of the conusor, are not liable to the execution of the conusee upon a statute staple. Bro. Mer. 71.

By an heir, for that the executrix of the conusee had taken parcel of the conusor's lands in execution, but omitted to take other lands. Bro. Mer. 73.

General Audita Querelas.

Upon a statute merchant unduly executed. Wi. Ent. 12.

For three, where the defendant recovered judgment in the common bench against one, and another judgment against him and two others who were his bail; upon the recognizance a writ of error was brought upon the judgment on the recognizance, and the judgment affirmed. A writ of error brought upon the first judgment which was reversed, and therefore the judgment upon the recognizance ought to be discharged. Nevertheless the defendant sued out an execution against them, and the plaintiffs rendered themselves prisoners to the Marshal in execution. A demurrer thereto. 2 Bro. 45.

Brought by one of the bail, for that the principal had paid the money before the judgment had against the bail. Thes. Br. 22.

Brought by bail, for that the defendant was taken in execution, upon a judgment obtained in London, after the cause removed by Habeas Corpus. Thes. Br. 9.

The plaintiff was imprisoned by the defendant and another, and by duress gave a bond, and was afterwards again imprisoned until he acknowledged judgment thereon; and being present in court

References to Precedents

was committed to the Marshal in execution, at the instance of the defendant. Vid. 108.

For two, where one by durefs, and another as his surety, made a warrant of attorney for his appearance, &c. no writ or process having been issued; defendant thereupon obtained judgment, and intended to sue them to execution. Vid. 111.

That the plaintiff by durefs acknowledged a fiat. fiat. whereupon the defendant was taken in execution. Bro. R. 126. Thef. Br. 31.

Where the defendant as administrator recovered judgment in the King's Bench against the plaintiff in trover, and afterwards the administration was revoked by a sentence in the court of delegates, and administration was committed to another. 2 San. 137. Thef. Br. 14.

For that, after the plaintiff had recovered upon a bond, he accepted another bond, with a new security. Thef. Br. 11.

Demurrer thereto.

A demurrer, for that the defendant did not bring into court the release in writing in the declaration above specified, which he ought to have done by the law of the land. Bro. Met. 70.

Bars thereto.

That the lands extended at the time of the judgment were the lands of the cognizor in possession, and a traverse that the cognizor demised for life; and as to the residue, that the cognizor was not seized of the lands omitted, and two issues thereon. 1 Vid. 105.

That the lands omitted descended to the heir of the cognizor, who at the time of the execution was under age; tenants say he is now of full age, and pray that the executor of the cognizee may have execution against him of the tenements omitted. The plaintiff doth not deny it, and execution is awarded. Bro. Met. 76.

That the defendant was ready to receive the money and traverse, that the plaintiff was ready, and tendered it. Wi. Entr. 21.

An audita querela upon a release of damages recovered in trespass in B. R. Defendant pleads non est factum. Mo. Intr. 105.

(P *88) One of the bail declares, that the principal had paid the money, before judgment was obtained against the bail. The defendant pleads, that the principal did not pay the money. Thef. Br. 27.

Defendant pleads that he recovered judgment, before he was cited to the delegates, touching the revocation of the administration. Thef. Br. 19. Demurrer and Joinder.

That a release in writing was first delivered such a day, and traverse, that the recognizance was first delivered at such a day. Ro. Entr. 158.

That

In Audita Querela.

That administration was committed to the wife of the intestate who recovered judgment against the plaintiff, and after that administration was fraudulently obtained by the defendant, with intent to release the plaintiff; which was revoked, and the first was in force. Demurrer thereto, and judgment for the defendant. Ro. Entr. 160.

Bar, that the defendant made the release by duress; replication that he made the writing voluntarily, and without compulsion, and not by duress. Issue thereon. Vid. 110.

By protestation, &c. for plea, that the plaintiff acknowledged the action voluntarily, and without compulsion, and traverses, that it was by duress. Replication and issue. Vid. 108.

That the plaintiff was not taken in execution at the suit of the deceased. Ro. Entr. 162.

Bar to an audita querela upon a voluntary escape, that the writ and declaration are insufficient; for plea says, that the plaintiff was imprisoned as above, &c. and so remains, with a traverse to the voluntary escape of the sheriff; replication, the sheriff voluntarily permitted the plaintiff to escape, and issue. Bro Mer. 56.

The like of a judgment confessed. Vid. 107.

That the defendant recovered judgment before any appeal was prosecuted in the court christian, for revoking the letters of administration granted to him; demurrer and judgment for the plaintiff. 2 San. 145.

Upon a release (made to one of the three that committed a joint battery, and named in one writ, after verdict against one, and before the day in bank) defendant in audita querela pleads no such record of the original writ, and the recovery of costs thereupon. Plaintiff demurs, and defendant's plea adjudged double and ill. Mo. Int. 94.

Process therein.

An audita querela in the Common Pleas, upon a statute staple. 2 Bro. 50. Mo. Intr. 102, 139. Ro. Entr. 157. Wi. Entr. 14. the like. Bro. Met. 80.

The like upon a judgment in the King's Bench. Br. R. 122. 124.

The like in the King's Bench upon a judgment in the Common Pleas. 2 Bro. 45. Vid. 104.

The like in the King's Bench upon a judgment in the same court. Vid. 108, 110.

The like in the Common Pleas upon a recognizance in Chancery. Ro. Entr. 155.

The plaintiff shewed the writing in Chancery. Wi. Ent. 15. 2 Bro. 51. Vid. 110. Ro. Entr. 159. Br. R. 122.

Where the plaintiff had the bond in his own custody. Ro. Entr. 153. Br. Red. 125.

The plaintiff came in his proper person. 2 Bro. 52. Ro. Entr. 155. bis.

References to precedents

The plaintiff taken in execution by the sheriff and brought to the bar. Ro Entr. 161.

The plaintiff surrendered himself to prison, and came into court in custody of the marshal, in execution. Vid. 110. 2 Bro. 47.

The plaintiff present in court, at the petition of the defendant was committed to the marshal in execution, and came into court in his custody. Vid. 108.

The defendant appeared after two Nichils, returned upon a scire facias, and had an imparlance. A Demurrer to the writ and count. 2 Bro. 49.

The plaintiff came into court by attorney. 2 Bro. 51.

The like by a next friend. Ro. Entr. 158.

The like by attorney specially admitted by the court. Ro. En. 156.

A distringas in an audita querela. Mo. Intr. 243.

The entry of a distringas in audita querela. 2 Bro. Met. 79.

A venire facias awarded, the sheriff returned a tarde, and to another venire facias, that the defendant is attached by his pledges, and a declaration thereupon. Ro. Entr. 162.

Superfedeas of an execution of lands for the tertenant. Vid. 103.

(P *89) *The defendant made default after two Nichils returned upon a scire facias; the declaration, and judgment for the plaintiff. 2 Bro. 53.

The king hath sent to his justices his writ close in these words. Wi. Entr. 12. Vid. 102, 108, 109. 2 Bro. 45, 52. Ro. Entr. 154. Bro. R. 124, 126, 127. 2 San. 137. Mo. Intr. 105.

It is commanded to the sheriff, &c. Wi. Entr. 14. 2 Bro. 50. Vid. 104.

Declaration with the entry of heretofore as it appeareth. Wi. Entr. 12. Ro. Entr. 155, 159, 161. Bro. R. 122.

Imparlance after oyer of a release. Ro. Entr. 158.

Imparlance. *ibid.*

A plea after imparlance. Ro. Entr. 158, 160.

The like after oyer of a defeazance. Wi. Entr. 21.

Venire facias awarded. Vid. 107. 2 Bro. 51. Ro. Entr. 155, 158, 161. Br. R. 122, 126. 2 San. 144. Mod. Intr. 104. Bro. Met. 75.

Scire Facias awarded. Vid. 109, 110, 112. 2 Bro. 49, 52. Ro. Entr. 156. Br. R. 126, 128. Cl. Man. 48, 49.

Superfedeas in Audita Querela. Mod. Intr. 105.

Scire Facias after a judgment. Thes. Bro. 243.

The like to acknowledge or deny a release after judgment, upon the statute of forcible entry. *Ibid.* 346.

The like against an executor upon an Audita Querela brought upon a recognizance acknowledged by the testator before the chief justice. *Id.* 206.

The like upon an Audita Querela upon a recognizance acknowledged by an infant. *Id.* 265.

The like against the bail of the plaintiff, upon an Audita Querela on a nonprofs. *Id.* 244.

The

Actions on the Case.

The award of a venire facias to a defendant in an Audita Querela. Ibid. 13, 26, 28, 30.

Elegit upon a restitution awarded upon an Audita Querela brought in chancery, and transmitted into the court of King's Bench, Idem. 98.

Actions on the Case.

Norfolk (ff.) **A.** B. complains of C. D. being in the custody of the Marshal of the *Marshalsea* of our Sovereign Lord the King, before the King himself, for that, whereas the said C. D. on the tenth day of *March*, in the fifth year of the reign of our Sovereign Lord *George* the second, King of *Great Britain*, and so forth, was indebted to the said A. B. in fifty pounds of lawful money of *Great Britain*, for the like sum of money, by him the said C. before that time had and received to the use of the said A. and being so indebted, he the said C. afterwards (*that is to say*) on the same day and year, at *Thetford* aforesaid, in the county aforesaid, in consideration thereof, then and there undertook, and faithfully promised, that he the said C. D. would well and truly content and pay to the said A. the said sum of fifty pounds, whenever after he should be thereto required. And whereas the said C. afterwards (*that is to say*) on the same day and year, at *Thetford* aforesaid, was indebted to the said A. in another sum of fifty pounds, of like lawful money of *Great Britain*, for the like sum of money by the said A. before that time, at the special instance and request of the said C. and to the use of the said C. paid, laid out, and expended; and being so indebted, he the said C. afterwards (*that is to say*) the same day and year, at *Thetford* aforesaid, in consideration thereof, undertook, and * faithfully promised the said A. that he would well and and truly content to pay him the said fifty pounds last mentioned, whenever after he the said C. should be thereto required. And whereas the said C. afterwards (*that is to say*) the same day and year, at *Thetford* aforesaid, was indebted to the said A. in the further sum of fifty pounds, of like lawful money, for the like sum before that time, by the said A. lent to the said C. at his special instance and request; and being so indebted, the said C. afterwards (*that is to say*) the same day and year, at *Thetford* aforesaid,

For money
had and re-
ceived,

For money
laid out and
expended,

(P *90)

For money
lent.

Actions on the Case.

aforesaid, in consideration thereof, undertook, and faithfully promised the said *A.* truly and faithfully to content and pay him the said fifty pounds last mentioned, whenever after he the said *C.* should be thereto required.

And whereas the said *A.* afterwards, (*that is to say*) the same day and year, at *Thetford* aforesaid, at the special instance and request of the said *C.* sold and delivered to him divers goods and merchandizes of him the said *A.* he the said *C.* in consideration thereof, then and there undertook, and faithfully promised, that he the said *C.* would well and truly pay to the said *A.* so much money as such goods, wares and merchandizes so sold to the said *C.* by the said *A.* were reasonably worth, at the time of the sale and delivery thereof, whenever after he the said *C.* should be thereto required. And the said *A.* doth aver in fact, that the said goods, wares and merchandizes, so sold to the said *C.* by him the said *A.* as above, were, at the time of the sale and delivery thereof, reasonably worth the further sum of fifty pounds of like lawful money (*that is to say*) at *Thetford* aforesaid, of which the said *C.* afterwards (*to wit*) the same day and year, at *Thetford* aforesaid, had notice.

For goods
fold and de-
livered for
as much as
they were
really
worth.
With an
avermēt,
that they
were worth
50*l.*

And whereas the said *C.* afterwards (*to wit*) the same day and year, at *Thetford* aforesaid, was indebted to the said *A.* in the further sum of sixty pounds, of like lawful money of *Great Britain*, for divers other goods, wares and merchandizes of the said *A.* by him before that time sold and delivered to the said *C.* at his special instance and request; and being so indebted, he the said *C.* afterwards (*to wit*) the same day and year, at *Thetford* aforesaid in consideration thereof, undertook, and faithfully promised the said *A.* that he the said *C.* would well and truly content and pay him the said *A.* the said sum of fifty pounds last mentioned, whenever after he the said *C.* should be thereto required.

In indebi-
tatus af-
fumpit: for
another 50*l.*
for goods,
wares and
merchan-
dizes sold
and deliver-
ed.

And whereas the said *C.* afterwards (*to wit*) the same day and year, at *Thetford* aforesaid, was indebted to the said *A.* in another sum of ninety pounds of like lawful money, for meat, drink, washing and lodging by the said *A.* for the said *C.* at his like special instance and request, before that time found and provided; and being so indebted, the said *C.* afterwards (*to wit*) the same day and year, at *Thetford* aforesaid, in consideration thereof, undertook, and then and there faithfully promised, that he the said *C.* would well and truly content and pay to the said *A.* the said sum of ninety pounds, whenever after he the said *C.* should be thereto required.

For ano-
ther 50*l.*
for meat,
drink,
washing
and lodg-
ing.

And whereas afterwards, (*to wit*) the day and year above, at *Thetford* aforesaid, in consideration that the said *A.* before that time, at the special instance and request of the said *C.* had found and provided for the said *C.* other sufficient meat, drink, washing and lodging, for a long time (*to wit*) for the space of twelve months then last past, at *Thetford* aforesaid, he the said *C.* then and there under-
took

A quantum
meruit for
meat, drink
&c.

(P * 91)

Actions on the Case.

took and faithfully promised the said *A.* that he the said *C.* would well and truly pay to the said *A.* so much lawful money of *Great Britain* as the said *A.* reasonably deserved to have of the said *C.* for such meat, drink, washing and lodging, so found and provided by the said *A.* for the said *C.* as above, (*to wit*) at *Thetford* aforesaid. And the said *A.* saith in fact, that he reasonably deserved to have of the said *C.* for the said meat, drink, washing and lodging, so found and provided for the said *C.* as above, the sum of fifty pounds, of lawful money of *Great Britain*, of which the said *C.* afterwards (*to wit*) the same day and year aforesaid, at *Thetford* aforesaid, had notice from the said *A.*

And whereas the same day and year at *Thetford* aforesaid, the said *C.* was indebted to the said *A.* in the sum of one hundred pounds of like lawful money, for certain work and labour done and performed by the said *A.* in his trade of a carpenter, before that time for the said *C.* at his special instance and request, and for divers materials, and necessary things found and provided by the said *A.* in and about such work, at the like special instance and request of the said *C.* and being so indebted, the said *C.* afterwards (*to wit*) the same day and year, at *Thetford* aforesaid, in consideration thereof, undertook, and faithfully promised the said *A.* that he the said *C.* would well and truly content and pay him the said *A.* the said one hundred pounds, whenever he should be thereto required.

And indebtedatus assumpsit for work and labour.

And whereas the said *A.* afterwards (*to wit*) the day and year, above mentioned, at *Thetford* aforesaid, had done and performed for the said *C.* at his like special instance and request, certain other work and labour in his the said *A.*'s trade of a carpenter; and had, at the like instance and request of the said *C.* found and provided divers other materials and things used and employed in and about the said work and labour last mentioned, he the said *C.* then and there, in consideration thereof, undertook, and faithfully promised the said *A.* that he would content and pay to the said *A.* all such sums of money as the said *A.* deserved to have for such work and labour last above mentioned to be done and performed by the said *A.* for the *C.* and for such materials about the same, found and provided by the said *A.* as aforesaid, whenever he should be thereto required. And the said *A.* in fact saith, that he reasonably deserved to have for the said work and labour last above mentioned, to be done and performed for the said *C.* by him the said *A.* the sum of fifty pounds of like lawful money; and that for the necessary materials, and things found and provided by the said *A.* in and about such work and labour, he reasonably deserved to have another sum of fifty pounds, of like lawful money, of which the said *C.* afterwards (*to wit*) the same day and year, at *Thetford* aforesaid, had notice from him the said *A.*

A quantum meruit for the same.

And whereas, the same day and year, at *Thetford* aforesaid, the said *C.* was indebted to the said *A.* in the further sum of twenty pounds of like lawful money, for curing and healing one *F. D.* daughter

And indebtedatus assumpsit for an apothecary's bill for the defendant's daughter.

(P*92)

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daughter of the said C. D. (at the special instance and request of the said C.) of divers diseases and infirmities, which the said F. before that time laboured under; and being so indebted, the said C. afterwards (*to wit*) the same day and year aforesaid, in consideration thereof, undertook, and faithfully promised to pay to the said A. the said twenty pounds, whenever he should be thereto requested.

A quantum
meruit for
the same.

And whereas the said A. the same day and year, at *Thetford* aforesaid, at the special instance and request of the said C. D. had healed and cured the said F. D. daughter of the said C. D. of divers other infirmities and diseases which the said F. D. before that time laboured under, the said C. D. then and there, in consideration thereof, undertook, and faithfully promised, that he the said C. would well and truly pay to the said A. all such sums of money as he the said A. reasonably deserved to have for the same; and the said A. in fact saith, that he reasonably deserved to have for the same from the said C. another sum of twenty pounds of which the said C. D. had notice from the said A. on the day, and at the place aforesaid. And whereas the same A. and C. afterwards (*to wit*) the same day and year, at *Thetford* aforesaid, accounted together of and concerning divers sums of money before that time due to the said A. from the said C. and then in arrear and unpaid; and upon such account stated, the aforesaid C. was then and there found to be in arrear to the said A. in the sum of one hundred pounds of like lawful money, and being so found in arrear, the aforesaid C. in consideration thereof, (*to wit*) the same day and year, at *Thetford* aforesaid, undertook, and to the said A. then and there faithfully promised, that he the said C. would well and truly content and pay the said A. the aforesaid one hundred pounds, whenever afterwards he should be thereto required. Nevertheless, the aforesaid C. not regarding his several promises and undertakings aforesaid, made in form aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said A. in this particular, hath not paid the several sums, or any part thereof, to the said A. nor in any manner howsoever made him satisfaction for the same, altho' the aforesaid C. hath been requested thereto by the said A. afterwards, (*to wit*) the tenth day of *May*, in the year first abovementioned, and often afterwards, at *E.* aforesaid in the county aforesaid, but he the said C. hitherto hath, and still doth refuse so to do: Wherefore he the said C. saith, that he is thereby injured and endamaged to the value of three hundred pounds, and therefore hath brought this suit, *and so forth.*

An infirmul
computaf-
set.

A declara-
tion upon a
promissory
note against
the defend-
ant as
drawer,
payable one
month after

London ff. A. B. late of the parish of *St. Michael Queenhithe*, *London*, was attached to answer to C. D. of a plea of trespass upon the case, *and so forth*; and the said C. by *John Cock*, his attorney, complains, that whereas the said A. the tenth day of *March*, in the year of our lord one thousand seven hundred and thirty one, at the parish of *St. Mary le Bow*, in the ward of *Cheap*, *London*, made a certain promissory note in writing, and subscribed his hand writing thereto,

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thereto, and delivered the same to the said C. by which he promised to pay to the said C. or to his order, twenty pounds of lawful money of *Great Britain*, one month after date, for value received; by reason of which, and by force of the statute in that case made and provided, the said A. became liable to pay to the said C. the said twenty pounds, at the time in the said note for that purpose limited and appointed; and being so indebted, the said A. in consideration thereof, the same day and year above mentioned, at the parish and ward aforesaid, undertook, and faithfully promised the said C. that he would well and truly pay him the said sum of twenty pounds mentioned in the said note, at the time for that purpose therein limited and appointed. And whereas also the said A. afterwards (*that is to say*) the tenth day of *April*, in the year of our Lord one thousand seven hundred and thirty two, at *London* aforesaid, in the parish and ward aforesaid, made another promissory note in writing, bearing date the day and year last above mentioned, and subscribed the same with his own hand, and delivered it to the said C. and thereby promised to pay to the said C. one hundred pounds, of like lawful money of *Great Britain*, on demand, for value received; by reason whereof, and by force of the statute in that case made and provided, the said A. became liable to pay to the said C. the said one hundred pounds upon demand; and being so liable, the said A. afterwards (*that is to say*) the same day and year, at *London* aforesaid, in the parish and ward aforesaid, in consideration thereof, undertook, and faithfully promised the said C. he would well and truly pay him the said one hundred pounds whenever he should be thereto required. And whereas one G. F. afterwards (*that is to say*) the tenth day of *May*, in the said year of our Lord one thousand seven hundred and thirty two, made his promissory note in writing, bearing date the day and year last mentioned, and subscribed the same with his own hand, and delivered it to the said A. and thereby faithfully promised, that he the said G. would pay to the said A. or order, fifty pounds, six weeks after date, for value received: And afterwards, and before payment of the said fifty pounds, or any part thereof, to the said A. (*that is to say*) the tenth day of *June*, in the year aforesaid, at the parish and ward aforesaid, the said A. by an indorsement on the said note in writing, bearing date the day and year last mentioned, subscribed with the hand-writing of the said A. directed and appointed the said G. to pay the contents of the said note to him the said C. or his order, for value received. And the said C. faith- that in fact, he the said C. after the expiration of the said six weeks after the said date of the said note, (*that is to say*) the first day of *July*, in the year aforesaid, at the parish and ward aforesaid, shewed the said G. the said note, with the said indorsement thereon, and required the said G. to pay him the said C. the said fifty pounds therein contained, according to the tenor of the said note and indorsement

date; setting forth that A. made a promissory (P *93) note for 20l. By force of the statutes became liable to pay, &c. And being so liable promised to pay, &c. Another against the defendant as drawer, payable on demand. That A. made another note for 100l. thereby promising to pay the same on demand. And by force of the statute became liable, and being so liable, promised to pay, &c. Another declaration against the defendant, as indorser. That G. T. made a note for 50l payable to A. That A. indorsed it to G. And by the indorsement directed it to be paid to A. That A. indorsed it to the

Actions on the Case.

plaintiff.
That the
plaintiff
shewed the
note to the
drawer, and
requested
him to pay
it. That the
drawer re-
fused.
Notice to
the defend-
ant.

(P*94)

That by
force of the
statute the
defendant
became
chargeable.
And being
so charge-
able, pro-
mised to
pay, &c.
Another
declaration
against the
defendant,
as a second
indorfor.

That J. M.
made a note
to S. T.
That S. T.
indorfed it
to W. L.
Who in-
dorfed it to
A.

Who in-
dorfed it to
the plain-
tiff.

That the
drawer had
notice of
the indorse-
ments.

indorsement thereon made as aforesaid; but he the said G. then and there refused to pay the same to the said C. of which the said A. afterwards (*that is to say*) the said first day of *July*, in the year aforesaid, at the parish and ward aforesaid, had notice; by reason whereof, and by force of the statute in that case made and provided, the said A. became liable to pay to the said C. the said fifty pounds, mentioned in the said last mentioned note, and being so liable, the said A. afterwards (*that is to say*) the first day of *July*, in the said year of our Lord, at *London* aforesaid, in the parish and ward aforesaid, in consideration thereof, undertook, and faithfully promised the said C. that he the * said A. would well and truly pay him the said fifty pounds whenever after he should be thereto required. And whereas, the tenth day of *August*, in the said year of our Lord, one thousand seven hundred and thirty two, at the parish and ward aforesaid, one *J. M.* made a promissory note in writing, bearing date the day and year last mentioned, and subscribed the said note with his own hand, and delivered the same to one *S. T.* and thereby promised to pay to the said *S. T.* or order, one hundred pounds, of like lawful money of *Great Britain*, one month after date, for value received. And the said *S. T.* before payment of the said last mentioned sum, or any part thereof, by his indorsement in writing upon the said note, bearing date the day and year last mentioned, subscribed with his own hand at *London* aforesaid, in the parish and ward aforesaid, appointed and directed the said *J. M.* to pay the said one hundred pounds mentioned in the said note to one *W. L.* or his order, for value received. And the said *W. L.* afterwards and before the expiration of the said month, after the date of the said note, and before payment of the said one hundred pounds therein mentioned, or any part thereof, by another indorsement in writing, bearing date the day and year last above mentioned, subscribed with his own hand, at *London* aforesaid, in the parish and ward aforesaid, appointed and directed the said *J. M.* to pay the said one hundred pounds to the said A. at the time in the said note for that purpose limited and appointed; and the said A. afterwards, and before the expiration of the said month, after the date of the said note, and before payment of the said one hundred pounds therein mentioned, or any part thereof, by another indorsement in writing, bearing date the day and year last above mentioned, subscribed with his own hand, at *London* aforesaid, in the parish and ward aforesaid, appointed and directed the said *J. M.* to pay the said one hundred pounds to the said C. at the time in the said note for that purpose limited and appointed; of which several indorsements afterwards, the said tenth day of *August*, in the year last above mentioned, the said *J. M.* had notice at *London* aforesaid, in the parish and ward aforesaid. And the said C. D. in fact says, that afterwards, and at the expiration of one month from the date of the said note last mentioned, (*that is to say*) the twelfth day of

September

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September following, at the place aforesaid, he the said *C. D.* shewed the note, with the several indorsements above mentioned, thereon made and subscribed, to the said *J. M.* and then and there requested him to pay the said sum of money contained in the said note, to the said *C. D.* according to the tenor and purport of the same; but he the said *J. M.* then and there refused to pay the same; of which the said *A.* afterwards, (*that is to say*) the day, year, and place last above mentioned, had notice from the said *C.* and the said sum of money mentioned, in the said last mentioned note, or any part thereof, not having been paid by the said *J. M.* to the said *A.* by reason thereof, and by force of the statute in that case made and provided, the said *A.* became chargeable to pay to him the said *C.* the sum of money contained in the note; and being so chargeable, the said *A.* afterwards, (*that is to say*) the same day and year last above mentioned, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised to pay to the said *C.* the said sum last mentioned, whenever he should be there- to required. * Nevertheless, the said *A.* not regarding his said several promises and undertakings, but contriving, and fraudulently intending to deceive and defraud the said *C.* hath not paid him the said several sums of money, or any part thereof; altho' the said *A.* afterwards, (*that is to say*) the same day and year last above mentioned, and often times afterwards, at *London* aforesaid, in the parish and ward aforesaid, was by the said *C.* there- to requested; but the said *A.* hitherto hath, and still doth refuse so to do, whereby the said *C.* saith, that he is injured and endamaged to the value of five hundred pounds, and therefore brings his suit, (*and so forth.*)

A request to the draw- er, and re- fusel.

That the money was not paid by the said *S. T.* or by the said *W. L.* That by force of the statute the defendant was charge- able.

(P *95) And being so liable, promised to pay, &c.

MORTON against SLEDDALL.

Midd. (to wit) *John Morton* complains of *John Sleddall* in the custody of the Marshal, (*and so forth,*) for that whereas the said *John Sleddall* the 13th of *April*, in the year of our Lord 1717, at *Westminster* in the said county, (he then being a person trading, merchandizing, and using commerce, at *Westminster* aforesaid) according to the usage and custom of merchants, made his certain bill of exchange in writing, subscribed with his own hand, bearing date the same day and year, and directed the said bill of exchange drawn re- to one *Kingsmill Eyre*; by which said bill of exchange, the said *John Sleddall* required the said *Kingsmill* to pay to one *Thomas Pi- pon*, or to his order, the sum of 20*l.* twenty days after sight of the said bill, value received, and to place it to the account of sub- sist- ence, for the use of Captain *Spicer's* company of invalids; which said

Declarati- on upon a bill of ex- change against the drawer, the person upon whom it was drawn re- fusing to accept it. Lilly 44.

That the defendant made a bill. Drawn up.

Thomas

Actions on the Case.

on King-
mill Eyre,
Esq.
That Pipon
indorsed the
same to one
John Vow-
ler.
Who in-
dorsed the
same to the
plaintiff.

Averment,
that the
person up-
on whom
it was
drawn re-
fused to ac-
cept it.
By which
he became
liable to
pa .

(P *96)

Thomas Pipon, afterwards (*to wit*) the 14th day of *May*, in the said year of our Lord at *Westminster* aforesaid, by his indorsement upon the same bill of exchange, made according to the usage and custom of merchants, ordered the contents of the said bill, to be paid to one *John Vowler*, or to his order; which said *John Vowler* afterwards, (*to wit*) the 27th day of *May*, in the year aforesaid, at *Westminster* aforesaid, by his indorsement upon the same bill of exchange made, according to the usage and custom of merchants, ordered the contents of the same bill, to be paid to the said *John Morton*, or to his order: And the said *John Morton* in fact says, that afterwards (*to wit*) the 1st day of *June* in the year above said, at *Westminster* aforesaid, he shewed the said *Kingsmill Eyre* the said bill, with the indorsement thereupon made, and then and there required him to accept the said bill, which the said *Kingsmill* then and there refused to do, or ever to pay the said 20*l.* therein mentioned; of which premisses the said *John Sleddall* afterwards, (*to wit*) the 8th day of *June*, in the year aforesaid, at *Westminster* aforesaid, had notice, by reason of which premisses, he the said *John Sleddall*, according to the usage and custom of merchants, became, and is chargeable to pay to the said *John Morton*, the said 20*l.* mentioned in the said bill of exchange. And the said *John Sleddall*, being so chargeable, afterwards, (*to wit*) the same day and year at *Westminster* aforesaid, in consideration thereof, undertook, and to the said *John Morton*, then and there faithfully promised, that he the said *John Sleddall*, would well and truly content and pay to the said *John Morton*, the same 20*l.* And also whereas the said *John Sleddall*, the 30th day of *August*, in the year aforesaid, was indebted to the said *John Morton*, • in 80*l.* for money by the said *John Sleddall* before that time received, to the use of the said *John Morton*; and being so indebted, the said *John Sleddall*, the day and year last aforesaid at *Westminster* aforesaid, in consideration thereof, undertook, and then and there faithfully promised to the said *John Morton*, that he the said *John Sleddall* would well and truly content and pay to the said *John Morton*, the said 80*l.* whenever he should be thereto required. Nevertheless the said *John Sleddall* little regarding his said several promises and undertakings, but wickedly and fraudulently intending, craftily and subtilly to deceive and defraud him the said *John Morton* in that behalf, hath not paid the said several sums of money, or any part thereof to the said *John Morton*, altho' the aforesaid *John Sleddall* was requested thereto by the said *John Morton* afterwards, (*to wit*) the 31st of *August*, in the year aforesaid, and often after that time at *Westminster* aforesaid, but always hitherto hath, and still doth refuse so to do, to the damage of the said *John Morton*, 80*l.* for which he brings this suit, and so forth.

Actions on the Case.

BELASYSE against HESTER.

Trin. 9 W. 3. Roll 493.

Surrey, (to wit) *John Hester* was attached by his Majesty's writ of privilege, issuing out of this court, to answer to *Richard Belasyse*, Esq. one of the clerks of *John Cooke*, Esq. principal prothonotary of his Majesty's court of common bench, according to the liberties and privileges of the same court, for the said prothonotary, or any of his clerks, and other officers of the same bench, from the time whereof the memory of man is not to the contrary used and approved of in the same, of a plea of trespass upon the case, and so forth. And whereof the said *Richard* in his proper person complains, that whereas the first day of *May*, in the year of our lord 1697, and long before, as well the said *John Hester*, as one *William Greveson*, were persons trading in the way of merchandize, and negotiating and using commerce within this kingdom of *England*, (to wit) at *Southwark* in the county of *Surrey*. And the said *William* the same day and year at *Southwark* aforesaid, according to the custom of merchants, made his certain bill of exchange, bearing date the same day and year, directed to the said *John Hester*, and thereby requiring the said *John Hester* in ten days after sight of the said bill of exchange, to pay to the said *Richard* by the name of *Richard Belasyse*, Esq. or to his order, the sum of ten pounds for the like sum received of *Mr. William Wilkinfon*. And the aforesaid *John Hester* afterwards, (to wit) the 7th day of *May* in the said year of our Lord 1697, at *Southwark* aforesaid, had notice, and a sight of the said bill of exchange, and according to the usage and custom of merchants, then and there accepted the same; and by reason thereof, he the said *John Hester* became liable to pay to the said *Richard* the said 10l. in the same bill of exchange, mentioned according to the tenor and effect of the said bill; and being so liable, the aforesaid *John Hester* afterwards (to wit) the same day and year last aforesaid, at *Southwark* aforesaid, in consideration thereof undertook, and there faithfully promised the said *Richard*, * that he the said *John Hester* would well and truly pay to the said *Richard*, the said money contained in the said bill according to the tenor and effect of the same. And also whereas the aforesaid *John Hester*, the said day and year aforesaid, was indebted to the said *Richard*, in another 10l. of lawful money of *England*, for money before that time had and received by the said *John Hester*, to the use of the said *Richard*. And being so indebted, the said *John Hester* afterwards, (to wit) the same day and year at *Southwark* aforesaid, in consideration thereof, undertook,

Declaration upon a bill of exchange by the prosecutor to whom the money was payable against the acceptor. Lut. 1589. That the defendant and one Greveson were merchants. That Greveson made a bill of exchange. Drawn upon John Hester the Defendant; payable to Belasyse. That he accepted the same. By which he became liable, &c.

(P * 97)

Actions on the Case.

undertook, and then and there faithfully promised the said *Richard*, that he the said *John Hester* would well and truly content and pay the said sum of 10*l.* last mentioned to the said *Richard*, whenever he should be thereto required. Nevertheless, the said *John Hester*, not regarding his several promises and undertakings, but contriving, and fraudulently intending to deceive and defraud the said *Richard* (altho' the said *John* was by the said *Richard*, on the tenth day of *May*, in the year of our Lord one thousand six hundred and ninety-seven; and often afterwards, at *Southwark* aforesaid, requested thereto), yet the said *John* hath not contented or paid to the said *Richard* the said several sums, or any part thereof, but hitherto hath, and still doth altogether refuse so do, to the damage of the said *R.* twenty pounds; and therefore he brings this suit, and so forth.

HERLE against JENNEY and others.

Trinity Term, the tenth of King George.

That the
defendant
drew a bill
of exchange

London (to wit) *Thomas Jenney*, late of the city of *Norwich*, in the county of the said city, Esquire; *John Theophilus Desaguliers*, late of the parish of *St. Margaret's Westminster*, in the county of *Middlesex*, Doctor of Laws; *Thomas Moore*, late of *Lincoln's Inn*, in the county of *Middlesex*, Esquire; *Andrew Robinson*, late of the parish of *St. Margaret's, Westminster*, in the county of *Middlesex*, Esquire; *Thomas Burdus*, late of the parish of *St. Margaret's* in the county of *Middlesex*, Esquire; *John Lawton*, late of the same place, gentleman, and *William Branthwait*, late of the *Middle Temple, London*, Esquire, were attached to answer to *Nicholas Herle*, Esquire, of a plea of trespass on the case; and whereupon, the said *Nicholas*, by *James Rider*, his attorney, complains, that whereas the said *T. J. T. D. T. M. A. R. T. B. J. L.* and *W. B.* together with *John Collier*, late of the parish of *St. Martin's in the fields*, in the county of *Middlesex*, gent. and *Robert Hacket*, late of *Westminster*, in the county of *Middlesex*, Esquire, (which said *John Collier* and *Robert Hacket* now stand outlawed by process, for that purpose had in this court, upon the said writ, at the suit of the said *Nicholas*, of the plea aforesaid) the twenty-seventh day of *September*, in the year of our Lord one thousand seven hundred and twenty, at *London*, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, according to the usage and custom of merchants, time out of mind used and approved of, made their bill of exchange subscribed with their own hands, bearing date the same day and year, and directed the said bill of exchange to one *John Pratt*, Esquire, by which said bill of Exchange, the same *Thomas, John, Theophilus, Thomas, Andrew, Thomas, John, William, John* and *Robert* requested him the said *John Pratt*, to pay to the said *Nicholas*

Directed to
John Pratt,
Esq; there-
by requir-
ing him to
pay to the
plaintiff
1945*l.* on
demand.
(P *98)

has

Actions on the Case.

las Herle, upon demand, one thousand nine hundred forty-five pounds: and afterwards (to wit) the twenty first day of *October*, in the said year, one thousand seven hundred and twenty, at *London* afore said, in the parish and ward afore said, the said *Nicholas* gave notice to the said *John* of the said bill of exchange, and then and there required him to accept the same, and to pay the money therein contained, according to the usage and custom of merchants afore said, and according to the tenor of the same bill; but the said *John Clark* then and there refused to accept the same bill of exchange, or to pay the money therein contained; and the said *Nicholas* afterwards (to wit) the same day and year last mentioned, gave notice thereof to the said *T. J. J. T. D. T. M. A. R. T. J. L. W. F. C. and R.* (to wit) at *London* afore said, in the parish and ward afore said, by reason of which premises, and also by force of the said custom of merchants, time out of mind used and approved of, they said *T. J. J. T. T. M. A. T. B. J. L. W. F. C. and R.* according to the usage and custom of merchants, became, and are liable to pay to the said *Nicholas* the said sum specified in the said bill, according to the tenor of the same; and they the said *T. J. J. T. T. M. A. T. B. J. L. W. J. and R.* being so liable afterwards, (to wit) the same day and year last mentioned, at *London* afore said, in the parish and ward afore said, in consideration of the premises undertook, and then and there faithfully promised, that they the said *T. J. J. T. T. M. A. T. B. J. L. W. J. and R.* would well and truly content and pay to the said *N.* the said sum of money mentioned in the said bill, whenever they should be thereto required. And whereas the said *T. J. J. T. A. T. J. J. W.* and *R.* afterwards (to wit) the said twenty-seventh day of *September*, in the year one thousand seven hundred and twenty afore said, at *London* afore said, in the parish and ward afore said, according to the usage and custom of merchants afore said, time out of mind used and approved of, made a certain other bill of exchange, signed with their own hands, bearing date the same day and year last mentioned, and directed the same bill of exchange to the said *John Pratt*, Esq; by which said bill of exchange last mentioned, the same *T. J. J. D. T. M. A. T. J. L. W. A. T. B. L. J. C. and R.* requested the said *John Pratt* to pay to the said *Richard*, upon demand another thousand nine hundred forty five pounds out of money in the hands of the said *John Pratt*, belonging to the proprietors of the *Devonshire* mines and quarries, being part of the consideration money for the purchase of *Westbuckland*. And afterwards, (to wit) the said first day of *October*, in the said year one thousand seven hundred and twenty, at *London* afore said, in the parish and ward afore said, he the said *Nicholas* gave notice to the said *J. Pratt* of the said bill of exchange last mentioned, and then and there required him to accept the said bill, according to the usage and custom of merchants, and to pay the said bill last mentioned, according

That plaintiff gave notice of the bill to the person upon whom it was drawn. That he refused to accept it. That by the custom of merchants they became liable.

And being so liable. promised to pay.

That the defendants drew another bill. Whereby they required the said *John Pratt* to pay 1945l. out of money in his hands, belonging to the proprietors of the *Devonshire* mines, &c. That he refused to accept it.

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(P *99)

That by reason thereof the defendant became liable, and being so liable promised to

cording to the tenor of the same, but the said *John Pratt* then and there refused to accept the said bill last mentioned, or to pay the same: and the said *Nicholas* afterwards (to wit) the same day and year last mentioned, gave notice thereof to the said *T. J. T. T. A. T. J. J. W. and R.* (to wit) at *London* aforesaid, in the parish and ward aforesaid, and by reason thereof, and by virtue of the custom of merchants aforesaid, the said *T. J. T. T. A. T. J. J. W. and R.* according to the said custom, then and there became, and are liable to pay to the said *Nicholas* the said sum of money specified in the said last mentioned bill, according to the tenor of the same; and being so liable, the said *T. J. T. T. A. T. J. J. W. and R.* afterwards, the same day and year last mentioned, at *London* aforesaid, in the parish and ward aforesaid, in consideration thereof, undertook, and then and there faithfully promised to pay to the said *N.* the sum of money mentioned in the said last mentioned bill, whenever after they should be thereto required.

Then comes an *indebitat' assumpsit* for money due for, and unpaid upon buying several lands and tenements of the plaintiff by the defendants.

Another *indebitat' assumpsit* for money lent.

The like for money had and received.

pay, &c.
8 Mod. 265
21 Raym.
1361. 1
Stra. 591.

This case is reported in *modern cases* in law and equity 265, by the name of *Jenney and Heale*, but the true name of the case is upon the writ of error, *Jenney and others and Herle*.

And altho' in the Common Pleas, the plaintiff had judgment, yet this judgment was reversed in the court of King's Bench; and what was insisted upon for the defendant in error, in maintenance of the judgment, was, that this was a good bill of exchange, inasmuch as it had all the qualities of such a bill, that is, the drawer, payer and drawee, and that a set form of words was not necessary in bills of exchange, nor that it must be between merchants, on the reason of the case of *Bellasis and Hester*, in *Lut.* 589.

And that the drawing and signing every bill of exchange implied a consideration for so doing; so the expressing the money to come out of a certain fund did not make it worse.

But in order to reverse this judgment, it was insisted on the other side, that this was not a good bill of exchange, because contingent, and payable only in case that the person, upon whom it was drawn, had sufficient in his hands out of such fund; for if the person had not sufficient in his hands, he might have refused to accept it, and could not be charged for non-acceptance, therefore not a perfect and compleat bill of exchange, within the intention of the law, that favours bills of exchange for the benefit of trade, because they are to be negotiable.

And it was said by the court, that this was no more than a direction or appointment to the cashier, to pay the money, and doth not answer the necessity of trade; for as it is not negotiable as a bill

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bill for money, it would be hard to charge the drawer; for if he might be charged with such a note, then every man, who gives his steward an order or authority to pay money, might be charged for non-payment.

It was said by the court, that custom had carried bills of exchange a great way, but never so far as to make them payable out of a particular fund; and for these reasons, and some others, (but these the most material) the judgment was reversed.

P *100

JOHN LEWIN against FRANCIS BRUNETTI on a writ of error in the Exchequer-chamber, upon a judgment in the King's Bench.

Pleas before our sovereign Lord the King at Westminster, of the term of the Holy Trinity, in the fourth year of the reign of our sovereign Lord James the Second, King of England, &c. Roll 114.

Be it remembered that heretofore, (that is to say) in *Easter Term* last past, came before our sovereign Lord the King at *Westminster*, *Francis Brunetti*, merchant, by *G. W.* his attorney, and then brought here into the court of our said sovereign Lord the King, a certain bill against *John Lewen*, merchant, in the custody of the marshal, and so forth, in a plea (or in an action) of trespass upon the case, and there are pledges to prosecute (to wit) *John Doe* and *Richard Roe*, which said bill followeth in these words (to wit):

‘*London* (to wit) *Francis Brunetti*, merchant, complains of *John Lewin*, merchant, being in the custody of the marshal of the *Marshalsea*, of our sovereign Lord the King before the King himself, for this cause (that is to say) that whereas the city of *London* is, and time out of mind hath been an ancient city; and whereas the city of *Leghorn*, in parts beyond the seas, is, and time out of mind hath been an ancient city: and whereas an usance mentioned in any bill of exchange, directed by any merchant residing in *London*, for the time being, to any other merchant dwelling in the city of *Leghorn*, for the time being, is, and during the time aforesaid hath been, according to the custom used among merchants, three months from the date of such bill of exchange. And whereas, at *London* aforesaid, (to wit) at the parish of *St. Mary le Bow*, in *Cheap* ward; there is, and time out of mind hath been a custom used and approved of among merchants, and other persons trading and using merchandize at *London*, and merchants at the city of *Leghorn* aforesaid, (that is to say) that where any merchant dwelling or residing at *London* aforesaid, hath drawn any bill or bills of exchange, according to the usage of merchants, (to wit) a first, second, third and fourth, of one and the same tenor and effect, and for one and the same sum, and directed such bills of exchange to any merchant residing at *Leghorn* aforesaid, thereby requiring such merchant, to whom such

Declaration in an action upon a bill of exchange which the plaintiff had paid for the honour of the drawer of the bill.
Lutw. 896.
N. L. 276.
Carth. 129.
That London is an ancient city, and that Leghorn is an ancient city.
That a usance in bills of exchange from London to Leghorn is three months. And a custom for drawing one, two, three, or four bills of exchange

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the same tenor. And if such merchant directs such bills to any merchants residing at Leghorn, And if such merchant, upon whom it was drawn re-
P * 101 fuses acceptance, And if another merchant subscribesto pay, for the honour of the drawer, And if such merchant to whom the same is payable, Indorses the said bill, and such indorsee indorses the said bill and such last indorsee indorses the bill; and such last indorsee indorses the bill; and if such last indorsee indorses the said bill; and if such merchant, to whom the bill is directed, refuses payment, and the bill is protested; and if any other mer-
 bill hath been so directed, to pay at a usance, any sum of money specified in such bill of exchange, to any merchant therein named or his order, for value received from the same merchant to whom such bill of exchange hath been appointed to be paid, and to place the same to account, as by advice; and if such merchant, to whom payment of such bill of exchange hath been so directed refuse to accept the same, upon a request made to him for that purpose, by which such bill of exchange, according to the usage of merchants, hath been duly protested, for non-acceptance thereof: and if any other merchant, or other person exercising commerce, upon notice thereof given to him of such protest of such bill of exchange for non-acceptance thereof, *on the behalf, and for the honour of such merchant who had drawn such bill, undertook to pay such sum of money mentioned in the same, and subscribed any note, according to the usage of merchants, upon the return thereof: and if such merchant to whom, or to whose order, such bill had so been appointed to be paid by any indorsement made upon any of the said four bills of exchange, according to the usage and custom of merchants, ordered the payment of the said sum of money, mentioned in the said bill to any other merchant named in such indorsement, for value received from the same merchant: and if such merchant in such indorsement named, or his factor, lawfully authorized for that purpose, by any indorsement upon the same bill of exchange, according to the custom of merchants, ordered the payment of the said sum of money mentioned in the same bill, to be made to any other merchant named in the said indorsement, or his order, for value received from such merchants: and if such merchant, in such last indorsement named, by any other indorsement upon the same bill of exchange, according to the custom of merchants, ordered the payment of the sum of money mentioned in the same bill, to be made to any other merchant, or his order, for value received upon account: and if any such merchant, in such last indorsement named, by any other indorsement upon the same bill of exchange, according to the custom of merchants, ordered the payment of the same sum of money mentioned in the same bill, to be made to any other merchant, or his order for value in exchange: and if such merchant, to whom such bill of exchange had so been directed, refused, or neglected to pay such sum in such bill of exchange mentioned, according to the tenor and effect of the said bill of exchange, and the several indorsements thereon made; but instead thereof, permitted the same bill of exchange to be protested, according to the custom of merchants, for non-payment thereof; and if any other merchant or merchants, upon notice of such protest, for non-payment of such bill of exchange, on the behalf, and for the honour of such merchant to whom, or to whose order, the said sum of money mentioned in the same
 bill

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' bill of exchange, had so been appointed to be paid, and who ^{chant, for}
 ' so first indorsed the said bill, paid the sum of money ^{the honour}
 ' mentioned in the same, so protested as above for non-payment ^{of the}
 ' thereof, and all charges, costs and expences, for non-payment ^{drawer,}
 ' of the same bill of exchange, due and payable, according to the ^{pays such}
 ' usage of merchants, to such merchant, in such last indorsement ^{bill, and}
 ' named, to whom payment thereof by the same had been so ap- ^{the costs}
 ' pointed to be made; then such merchant, or other person exer- ^{and}
 ' cising commerce, who, on the behalf, and for the honour of such ^{charges;}
 ' merchant, who made such bill of exchange, had undertaken to ^{then such}
 ' pay the money mentioned in such bill, upon notice given him of ^{person so}
 ' such protest of such bill of exchange for non-payment thereof, ^{undertaking}
 ' and of the payment of the sum of money mentioned in the same ^{to pay the}
 ' bill, together with all charges, costs and expences on the part of ^{said bill for}
 ' the merchant, to whom, or to whose order, the sum mentioned ^{the honour}
 ' in the same bill was appointed to be paid, and who first indorsed ^{of the}
 ' the same bill, became chargeable, and hath been accustomed, ^{drawer, is}
 ' during all the time aforesaid, and ought to pay the sum of money* ^{liable to pay}
 ' mentioned in such bill of exchange, (the same, or any part thereof, ^{the said bill.}
 ' not being paid upon any of the said four bills of exchange) and
 ' all charges, costs and expences for non-payment of the said sum
 ' of money, in the said bill of exchange protested for non-payments
 ' thereof to such merchant, to whom the payment of the same was
 ' appointed to be made.' *And whereas on the nineteenth day of
 July, one thousand six hundred eighty-six, at London aforesaid, in
 the parish and ward aforesaid, one *Abraham Henriques Valentine*,
 then and there exercising the trade of a merchant, according to the
 custom of merchants aforesaid, made four bills of exchange, all of
 them bearing date the same day and year, and all of them of the
 same tenor and effect, and for one and the same sum, and directed
 the said bills of exchange to one *Jacob Abendano*, then at *Leghorn*,
 in parts beyond the seas, trading to, and using commerce at London
 aforesaid, in the parish and ward aforesaid: and by the first of the Jacob
 said four bills of exchange, the said *Abraham* requested the said
Jacob to pay, at a usance, that his first bill of exchange, to the
 order of the said *Francis B—*, then residing at London aforesaid,
 in the parish and ward aforesaid, and there exercising the trade of
 a merchant, five hundred pieces of foreign money, called pieces
 of eight of *Mexico* and *Seville*, for value from the same *F. B.* and to
 place the same to account, as by advice; which said bill the said
Francis afterwards, (to wit) on the ninth day of *September*, in the
 said year, at *Leghorn* aforesaid (to wit) at London aforesaid, in the
 said parish and ward, shewed to the said *Jacob Abendano*, and then
 and there required the said *J. A.* to accept the said bill, according

That one A.
 H. being a
 merchant,
 made four
 bills of
 exchange of
 equal date
 and tenour,
 directed to
 Jacob
 Abendano:
 and by the
 first request-
 ed him to
 pay the said
 first bill to
 the rider of
F. B. 500
 pieces of
 foreign mo-
 ney.

K 2

to

*Note; 'Tis now not usual, but needful, thus to set forth the custom of merchants;
 and the best way of declaring it: as in Fol. 108. Poitea.

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J. A. refused to the custom of merchants; but the said J. A. then and there altogether refused to accept the same, by reason of which, the said bill of exchange afterwards (to wit) on the same ninth day of September, in the said year, at *Leghorn* aforesaid (to wit) at *London* aforesaid, in the said parish and ward, according to the custom of merchants, was duly protested for non acceptance thereof: of all which said premisses, the said *John Lewen* afterwards, (to wit the same ninth day of September, in the said year, at *London* aforesaid, in the said parish and ward, residing and exercising commerce there, had notice, and then and there saw the said protest in writing, and thereupon the said *John Lewen* afterwards (to wit) the same day and year at *London* aforesaid, in the said parish and ward, made and subscribed with his own hand, according to the custom of merchants, a certain note in writing, on the behalf, and for the honour of the said *Abraham*, and thereby promised to pay that bill of exchange upon the return thereof. And whereas the said *Abraham*, by the second bill of the said four bills of exchange, required the said *Jacob*, at a usance, to pay that his second bill of exchange, (his first not being paid) to the order of the said F. five hundred pieces of foreign money, called pieces of eight of *Mexico* and *Seville*, for value of the said F. and to place the same to account, as by advice. And whereas the said *Francis* afterwards (to wit) the day and year aforesaid, at *London* aforesaid, in the said parish and ward, according to the custom of merchants, by his indorsement upon the said second bill of exchange, required the said *Jacob* to pay to the order of one *Alvarez de Costa*, then exercising the trade of a merchant, named in the said indorsement, the aforesaid five hundred pieces of foreign money, mentioned in the said indorsed bill of exchange, for value of him received. And whereas one *Joaz Mendes de Costa*, factor to the said *Alvarez de Costa*, (lawfully authorized) the same day, year and place, by an indorsement upon the said bill of exchange, according to the custom of merchants, required the said *Jacob* to pay to the order of one *Manuel de Vega*, then exercising the trade of a merchant, named in the said indorsement, the said five hundred pieces of foreign money, mentioned in the said indorsed bill of exchange, for value on account. And whereas the said *Manuel de Vega*, the same day and year, at *Amsterdam*, (that is to say) at *London* aforesaid, in the said parish and ward, by an indorsement upon the said bill of exchange, according to the custom of merchants, required the said *Jacob* to pay to the order of one *Paolo* and *Jeronimo*, then exercising the trade of merchants, named in that indorsement, the aforesaid five hundred pieces of foreign money, mentioned in the said indorsed bill of exchange, for value received of the said P. and J. And whereas the said P. and J. the same day, year and place last aforesaid, by their indorsement upon the said bill of exchange, according to the custom of merchants, requested the said *Jacob* to pay to the order of one *Aurelio Rezonica*, then

J. A. refused to accept it.

J. L. the defendant having notice,

accepted to pay, for the honour of the drawer,

T. indorsed the second bill to the order of A. de Costa.

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J. M. de Costa, lawfully authorized, indorsed the same to the order of M. de Vega.

Manuel de Vega indorsed the same to Paolo and Jeronimo Parenti.

Who indorsed the same to A. R.

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then exercising the trade of a merchant, named in that indorsement, who in-
the said five hundred pieces of foreign money mentioned in the said indorsed bill of exchange, for value upon account. And whereas the same *Aurelio*, the same day and year, at *Venice*, (to wit) at *London* aforesaid, in the said parish and ward, by an indorsement upon the same bill of exchange, according to the custom of merchants, requested the said *Jacob* to pay to the order of one *Jacob Arges*, then exercising the trade of a merchant, named in the said indorsement, the said five hundred pieces of foreign money, mentioned in the said indorsed bill of exchange, for value in exchange, with *Valerio Cypriani*, which said bill of exchange, the said *Francis* afterwards (that is to say) the twentieth day of *October*, in the said year, at *Leghorn* aforesaid, (to wit) at *London* aforesaid, in the said parish and ward, shewed to the said *Jacob Abendano*, and then and there required him to pay the said bill, according to the tenor and effect of the same, and the indorsement thereon made; but the said *Jacob Abendano* then and there totally refused so to do; by which the same bill of exchange afterwards (to wit) the same day, year and place, was protested in writing for non-payment thereof in due manner, according to the custom made use of among merchants for that purpose. And thereupon, one *P. A. B.* and *L. A. B.* afterwards (to wit) the day and year aforesaid, then exercising the trade of merchants, having notice of the said protest of the said second bill of exchange for non-payment thereof, then and there, in the behalf, and for the honour of the said *Francis*, paid the said five hundred pieces of foreign money mentioned in the said bill of exchange, and the charges, costs and expences, amounting to ten pounds of lawful money of *England*, for non-payment thereof, to the said *Jacob Arges*, to whom the said bill was last indorsed. Of all which premisses the said *John Lewen*, afterwards (to wit) the first day of *December*, in the said year, at *London* aforesaid, in the said parish and ward, had notice, and then and there saw the said bill of exchange so returned as above; by means whereof and by reason of the premisses, the aforesaid *J. L.* by the custom of merchants, and the subscribing the aforesaid note, became chargeable with the payment of the said five hundred pieces of foreign money mentioned in the said bill of exchange, and all charges, costs and expences to the said *Francis*, by non-payment thereof: and thereupon the aforesaid *J. L.* afterwards (to wit) the same day and year, at *London* aforesaid, in the said parish and ward, in consideration of the premisses, undertook, and then and there faithfully promised, that he the said *John* would well and truly content and pay to the said *Francis* the said five hundred pieces of foreign money, or the value thereof, being one hundred and twelve pounds of lawful money of *England*, and the charges, costs and expences aforesaid amounting to the sum of ten pounds, whenever he should be thereto required: nevertheless, the said *John*, not regarding his promises and undertakings

dorsed the
same to
A. R.

J. A. re-
fused to pay
the bill

That one P.
A. B. and L.
A. B. paid
the bill for
the honour
of the
drawer.

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That by rea-
son thereof
the defend-
ant became
liable to pay
the said
money.
And being
liable, pro-
mised to
pay.

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takings aforesaid, but contriving, and fraudulently intending in this particular craftily and subtilly to defraud and deceive the said *Francis* hath not paid to the said *Francis* the said five hundred pieces of foreign money, or the value thereof, being one hundred and twelve pounds, or any part thereof, nor hath in any manner made him satisfaction for the same; altho' the said *John* afterwards (to wit) the first day of *January*, in the year aforesaid, at *London* aforesaid, in the said parish and ward, was thereto required, but altogether hath, and still doth refuse so to do, to the damage of the said *Francis* one hundred and fifty pounds; and therefore he brings this suit; together with this, that the same *Francis* is ready to verify, that the said third and fourth bills of the said four bills of exchange were never paid by the said *Jacob Abendano*.

Upon this it was pleaded, that he made no such promise, and a verdict found for the plaintiff, and a writ of error brought and alledged in behalf of the plaintiff in error, that it did not appear that the money was paid to the last indorsee, for want of the words Jacob Arges, &c. inserted by me as may be seen above, where they are in a different character; but it being after a verdict, it was held, That it shall be intended, that the money was paid where it ought to have been.

DEATH against SERWONTERS on a Writ of Error in the Exchequer Chamber, upon a Judgment given in the King's Bench.

Pleas before our Sovereign Lord the King at Westminster, of the Term of St. Hillary, in the 36th and 37th years of our late Sovereign Lord Charles the Second, late King of England, and the first year of the reign of our Sovereign Lord James the Second, now King of England, and so forth. Roll 669.

I. utw. 885. *London* (to wit): Be it remembered that heretofore (*that is to*
 888. *say*) in the term of *St. Michael* last past, came *Cornelius Serwonters*
 N. L. 272. merchant, before his late Majesty *Charles* the Second, late King of
 England, by *John Green* his attorney at *Westminster*; and then
 P * 105 • brought there into his Majesty's court, his certain bill against
Thomas Death merchant, in the custody of the marshal, and so forth,
 of a plea of trespass upon the case, and the pledges of prosecuting
 are *John Doe* and *Richard Roe*; which said bill follows in these
 words. *London* (ss.) *Cornelius Serwonters* complains of *Thomas Death*
 merchant, in the custody of the marshal of the *Marshalsea*, of our
 Sovereign Lord the King before the King himself, for this cause
 (*that is to say*) that whereas the city of *London* is, and time out
 of

Actions on the Case.

of mind hath been an ancient city, and in the same, (*that is to say*) A declaration upon a bill of exchange against the acceptor upon a foreign bill of exchange drawn at Venice, in the parish of *St. Mary le Bow*, in *Cheap* ward; according to the usage, and an ancient custom, time out of mind used and approved of among merchants, trafficking from the city of *Venice* beyond sea, to the said city of *London*, a usance mentioned in any bill of exchange directed by any merchant residing at *Venice* aforesaid, to any merchant residing in *London* aforesaid, doth, and during all the time aforesaid, hath consisted of the space of three months from the day of the date of such bill of exchange. And whereas there is, and time out of mind hath been, an ancient and laudable custom, used and approved of in the said city of *London*, at the parish and ward aforesaid, among merchants residing at *Venice* aforesaid, and merchants residing at *London* aforesaid, that if any merchant residing at *Venice* aforesaid, upon receipt of any sum of money, or value thereof from any merchant residing at *Venice* aforesaid, hath drawn any bill of exchange, and directed the same to any other merchant residing at *London* aforesaid, and thereby requested such merchant to whom such bill should be so directed, at a usance, to pay any sum of money mentioned in such bill, to any other merchant or person named in such bill of exchange, or to his order, and to place the same to account, as by advice; and if such merchant to whom such bill hath been so directed upon sight of such bill, accepted the same according to the usage of merchants, then such merchant so accepting any such bill of exchange, became liable (at law by such his acceptance, to pay to such merchant, or other person, or his order, to whom payment by the said bill was directed, such sum of money as hath been directed to be paid in and by such bill of exchange. And if such merchant, or other person named in such bill of exchange, to whom, or to whose order, payment hath been so appointed to be made, by an indorsement upon such bill of exchange, appointed the sum of money therein mentioned to be paid, to any other merchant named in such indorsement, or to his order, for value mentioned to have been received, by such person, who had so made such indorsement, of such person or merchant, to whom such bill of exchange, was so directed to be paid; then such merchant to whom such bill was so directed, by virtue of his acceptance, and such indorsement, by the said custom used and approved of among merchants is, and time out of mind hath been accustomed to be liable to pay to such merchant or person, named in the indorsement of such bill of exchange, to whom, or to whose order, payment of such sum of money mentioned in such bill of exchange, was appointed to be made at the time limited in such accepted bill of exchange for the payment of the same. And if such merchant, or other person, to whom, or to whose order, by such first indorsement of such bill of exchange, the sum therein contained * was appointed to be paid, by another indorsement of such bill of exchange, appointed the same sum of money to be paid

If the first indorsee becomes an indorser,
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to

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Acceptor
liable to
pay to such
second in-
dorsee.

If the se-
cond indor-
sor indorses
it over.

The accep-
tor liable to
such third
indorsee,
paying the
money.
That L.
and J. B.
made a bill
of exchange
at Venice,
payable to
a merchant
at London.

That Chris-
topher
Ebertz
shewed the
bill to T.
D. who ac-
cepted it.

to some other merchant, or other person named in such other indorsement, or to his order for value mentioned in the same indorsement, to have been had and received by the merchant, who made such other indorsement; then such merchant to whom such bill had been so directed, by virtue of his said acceptance, by the said custom time out of mind used and approved of amongst merchants, is, and hath been accustomed to be liable to pay to such merchant or other person named in such other indorsement in such bill of exchange, and to whom, or to whose order, payment by the same indorsement was appointed to be made of such sum of money, mentioned in such bill, at the time limited in such bill for the payment thereof. And if such merchant, to whom such bill of exchange had been so directed, and by him accepted, made default in payment of the sum mentioned in such bill of exchange, to such other merchant or person, or his order, to whom, or to whose order payment thereof was appointed to be made, by such other indorsement at the time for that purpose mentioned in such bill; then by the custom of merchants, time out of mind used and approved of, if such merchant who made the said other indorsement, paid such sum to the said other merchant, or person to whom payment thereof, by such other indorsement was appointed to be made, or to his order, or satisfied him for the same; then by the custom of merchants, time out of mind used and approved of, the said merchant, to whom such bill so accepted was directed, became and stood liable to pay such sum of money to the said merchant or person, who by the said other indorsement made the said appointment, as if he by the said other indorsement had made no appointment concerning the same. And also whereas one *Lewis* and *John Baptist Morelli*, on the 30th day of *June*, in the year of our Lord 1684, were merchants, resident and used commerce at the city of *Venice*, to wit, at *London*, in the parish of *St. Mary le Bow*, in *Cheap Ward*; and the said *Lewis* and *John*, then and there, according to the usage and custom of merchants, time out of mind used and approved of in this kingdom, to wit, at *London* aforesaid, in the parish and ward aforesaid, drew their first bill of exchange, bearing date at *Venice* aforesaid, the same 30th day of *June* 1684, new stile, being the 22d of *June* 1684, *English* stile, and directed the same bill of exchange to the said *Thomas Death* merchant, likewise dwelling, exercising trade and commerce in *London* aforesaid, in the parish and ward aforesaid; and by their first bill of exchange, the said *Lewis* and *John* the same day and year directed the said *Thomas Death* at a vance, to wit, at the end of three months, to pay their said first bill of exchange to *Christopher Ebertz*, or order, one thousand ducats at fifty-one pence three farthings per ducat exchange with the same, and that he should place it to account, as by advice; which said *Christopher Ebertz* was then likewise a merchant, inhabiting and using trade and commerce in *London* aforesaid, in the said parish and ward, and

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and afterwards, and before the end of three months after the date of the said bill of exchange, *to wit*, on the 4th day of *July*, in the year of our Lord 1684. *English* stile, in *London* aforesaid, in the parish and ward aforesaid, the said bill of exchange was then and there shewn to the said *Thomas Death*; and he the said *Thomas Death*, according to the said custom of merchants, then and there accepted the said bill, and subscribed it with his own hand; and afterwards, *to wit*, on the 11th day of *August*, in the year of our Lord, 1684, new stile, being the first day of *August* 1684, *English* stile, the said *Christopher Ebertz*, for value received of the said *Cornelius Serwouters*, made his indorsement on the aforesaid bill of exchange in writing and subscribed his own hand thereto, bearing date the day and year last above mentioned, and thereby appointed the said sum mentioned in the said bill of exchange, to be paid to the said *Cornelius* or his order; by which said acceptance and indorsement of the aforesaid bill of exchange, according to the custom of merchants, used and approved of, as aforesaid; and by reason of the premisses, the said *Thomas Death* became liable to pay the said *Cornelius* the said thousand ducats, at fifty one pence three farthings for each ducat, mentioned in the same bill of exchange, at the time limited, in and by the same bill of exchange, *to wit*, at the end of three months, after the date of the said bill of exchange. And afterwards, and before the expiration of the said three months, *to wit*, on the 20th day of *August* in the year last above mentioned, new stile, being the 10th day of *August* last, *English* stile, at *London* aforesaid, in the parish and ward aforesaid, the said *Cornelius* made another indorsement on the said bill of exchange in writing, and subscribed his name thereto; and thereby appointed the same sum mentioned in the bill of exchange aforesaid, to be paid to *Adam Conrade de Wella*, by the name of *Mr. Adam Conrade de Wella*, or his order, for value received of one *Justice Smith*. And that afterwards, and before the expiration of the said three months, *to wit*, on the 19th day of *September*, in the year of our Lord 1684, new stile, being the 9th day of *September* 1684, *English* stile, the said *Adam Conrade de Wella*, at *London* aforesaid, in the parish and ward aforesaid, by his certain indorsement in writing subscribed with his own hand, appointed the said sum mentioned in the said bill of exchange, to be paid to one *David de Barry*, for *Adam Conrade de Wella*; which said *David de Barry* was factor and agent to the said *Adam Conrade de Wella*; of which said appointments aforesaid, by the said several indorsements aforesaid, the said *Thomas Death*, before the expiration of the said three months, had notice, *to wit*, at the parish and ward aforesaid: Nevertheless the said *Thomas Death* did not pay the said sum mentioned in the aforesaid bill, to the aforesaid *Adam Conrade de Wella*, nor to the said *David de Barry*, at the end and expiration of the said three months; and by reason thereof afterwards, *to wit*, on

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That C. E. indorsed the said bill.

That the plaintiff aforesaid indorsed it.

That A. C. de Wella indorsed it.

That the acceptor did not pay it.

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That the Defendant became liable to the plaintiff.

P * 108

And being so liable promised to pay, &c.

on the 10th day of *October*, in the year of our Lord 1684, old stile, at *London* aforesaid, in the parish and ward aforesaid, the said *Cornelius Serwonters* paid the said *Adam Conrade de Wella*, or to his order, the said sum contained in the said bill of exchange, by which the said *Thomas Death* became, and now is liable, by virtue of the said custom of merchants, to pay the sum of money to the said *C. S.* Whereupon, in consideration thereof, the aforesaid *Thomas Death*, to whom the aforesaid bill of exchange was directed, afterwards, to wit, on the 18th day of *October*, in the year aforesaid, *English* stile, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there promised to pay to the said *Cornelius* the said thousand ducats at fifty one pence, and three farthings per ducat, whenever he should be thereto requested. Nevertheless the said *Thomas* not regarding, but totally neglecting his said promise and undertaking, made in the manner aforesaid, hath not yet paid, but hitherto hath, and still doth refuse to pay to the said *Cornelius* the said thousand ducats, at fifty one pence, and three farthings each ducat, amounting to 21 *l.* 12s. 6d. of lawful money of *England*, or any part thereof, altho' the aforesaid *Thomas* afterwards, to wit, on the 20th day of *October*, in the year last above mentioned, at *London* aforesaid, in the parish and ward aforesaid, by the said *Cornelius* was thereto required; wherefore, he the said *Cornelius* saith, that he is injured and endamaged to the value of 400*l.* and thereof brings his suit, and so forth.

Two Errors were moved by the Plaintiff's Counsel in the Writ of Error.

Lutw. 888.
b.

1. That the custom was unreasonable; for as this custom is alleged, it may be, that the defendant will be thrice chargeable, but not allowed; for by the indorsement by *Ebertz* to the plaintiff, he was discharged from any payment to *Ebertz*: And by the indorsement of the plaintiff to *Conrade*, he was discharged from any payment to the plaintiff, until the plaintiff was afresh entitled to receive the money from the defendant, by the payment thereof to *Conrade*; so that at the time of the action brought against the defendant, no person was entitled to any action against him but the plaintiff.

2. That the plaintiff had not averred in his declaration, that the value was received by the drawers of the bill; but this exception was not allowed; for that does not lie in his power to say; and it was not material to him, whether value was paid to them or no, and therefore the judgment was affirmed.

HILL

Actions on the Case.

HILL against ARIAS,

London (ff.) *Peter Hill* complains of *Abraham Arias*, being in the custody of the marshal of the *Marshalsea*, of our sovereign Lord the King, before the King himself, for that whereas two usances and an half, in any bill of exchange made at *London* aforesaid, and directed to any person in *Amsterdam*, in parts beyond the seas are, and for so long a time as there is no remembrance of any man to the contrary, by the custom of the merchants, have been two calendar months and an half, from the date of such bill of exchange: And whereas, on the 6th day of *April*, in the year of our Lord 1703, at *London* aforesaid, in the parish of *St. Mary le Bow*, in *Cheap Ward*, one *Joseph Pereira*, then and there being a merchant, trading and using commerce, according to the custom of merchants, made his first bill of exchange, bearing date the same day and year, and directed the same bill of exchange to one *Jacquez Henriquez* in *Amsterdam* aforesaid, the same *Jacquez* being then a merchant, and using commerce at *Amsterdam* aforesaid, and by the same bill of exchange, the said *Joseph* requested the said *Jacquez* to pay at * two usances and an half, to the order of the said P. ——— 210l. sterling, at 34s. 3d. per pound, value for the same, and place it to account as by advice; (the said *Peter* then likewise being a merchant, trading and using commerce at *London* aforesaid, in the said parish and ward) And the said *Peter* in fact saith, that afterwards (that is to say) on the 23d day of *April*, in the same year, new stile, being the 12th day of *April* in the same year, *English* or old stile, the said bill of exchange was shewn to the said *Jacquez* at *Amsterdam* aforesaid, and he the said *Jacquez*, then and there altogether refused to accept the said bill of exchange, and the same bill remaineth yet unpaid; by reason whereof the said bill of exchange afterwards, to wit the said 23d day of *April*, in the year aforesaid, according to the usage and custom of merchants, was for want of acceptance thereof, in due manner protested at *Amsterdam* aforesaid, by reason of which said premisses, the said *Joseph* became chargeable, according to the custom aforesaid, to repay to the said pay. *Peter Hill*, the said 210l. immediately after sight of the protest in writing, as aforesaid. And said *Peter* in fact saith, that the written protest aforesaid, afterwards (to wit) the 1st day of *May*, in the year last aforesaid, at *London* aforesaid, in the said parish and ward, was shewn to the said *Joseph*; and the said *Joseph* was then and there requested to repay to the said *Peter* the said 210l. which the said *Joseph* then and there refused to do: Of all which premisses the said *Abraham* afterwards, (to wit) the 18th day of *May*, in the year aforesaid, at *London* aforesaid, in the said parish and ward had

What usances are.

That *Joseph Pereira*, a merchant, made a bill of exchange directed to P * 109 J. likewise a merchant, to pay 210l. at two usances and half to the plaintiff. That the bill was protested for want of acceptance; whereby the defendant became liable to

had

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And being so liable promised to pay.

That in consideration on the plaintiff would not sue the drawer, the defendant promised to pay. That he did not sue the drawer.

That the bill was protested and unpaid.

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That Jos. drew another bill to Jac. Henriques payable at two usances and an half, to the order of the plaintiff.

That J. H. refused acceptance.

had notice. And thereupon the said *Abraham*, in consideration that the said *Peter*, at the special instance and request of the said *Abraham*, had undertook, and then and there faithfully promised, that he the said *Peter* would desist from prosecuting the said *Joseph* upon the said bill of exchange, till after the time of payment of the said bill mentioned therein, the said *Abraham* undertook, and to the said *Peter*, then and there faithfully promised that he the said *Abraham* would pay to the said *Peter* the said sum of 210*l.* if the same should not be paid in *Amsterdam* aforesaid, at the time by the said bill of exchange limited for payment thereof. And the said *Peter* in fact saith, that after the said time limited for payment of the said bill of exchange, he did desist from prosecuting the said *Joseph* upon the bill of exchange aforesaid; and that the said 210*l.* mentioned in the said bill of exchange were not paid to the said *Peter*, at the time for that purpose limited in the said bill of exchange; by reason of which, the said bill of exchange afterwards, *that is to say*) the 6th day of *July*, in the year of our Lord 1703, new stile, being the 25th day of *June* old or *English* stile, was, according to the custom of merchants, duly protested at *Amsterdam* for want of payment thereof. And the said bill yet remaineth unpaid, *(that is to say)* at *London* aforesaid in the said parish and ward; whereof * the said *Abraham*, afterwards *(to wit)* the 1st day of *August*, in the year last mentioned at *London* aforesaid, in the said parish and ward, had notice. Nevertheless, the said *Abraham* not regarding his promise and undertaking aforesaid, but contriving, and fraudulently intending craftily and subtilly to deceive and defraud the said *Peter*, hath not paid to the said *Peter* the said sum of 210*l.* or any part thereof, altho' to do the same, the said *Abraham* afterwards, *(to wit)* the 1st day of *September*, in the year last mentioned at *London* aforesaid, in the said parish and ward, was requested by the said *Peter* so to do. And whereas also afterwards, on the 6th day of *April*, in the year aforesaid, at *London* aforesaid, in the said parish and ward, the said *Joseph*, according to the usage of merchants, made another first bill of exchange, bearing date the same day and year last aforesaid, and directed the said bill of exchange to the said *Jacquez Henriques* in *Amsterdam* aforesaid; and thereby the said *Joseph* requested the said *Jacquez* at two usances and an half, to pay to the order of the said *Peter* another sum of 210*l.* sterling, at 34*s.* 3*d.* per usance, value for the same, and to place it to account, as by advice. And the said *Peter* in fact saith, that afterwards, *(that is to say)* on the 23d day of *April*, in the said year, *English* stile, at *Amsterdam* aforesaid, the said bill of exchange last mentioned, was shewn to the said *Jacquez*, and the said *Jacquez* then and there refused to accept, or pay the said last mentioned bill of exchange: And the same remains yet unpaid, by reason whereof the said last mentioned bill of exchange afterwards *(that is to say)* the said 23d day of *April*, in the year aforesaid

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abovesaid at *Amsterdam* aforesaid, according to the usage and custom of merchants, was in due manner protested in writing. By reason of which premises the said *Joseph* became chargeable, according to the said custom, to repay to the said *Peter*, the said 210*l.* last mentioned, immediately upon sight of the before written bill so protested. Of all which premises the said *Abraham* then and there had notice; and thereupon the said *Abraham*, on the said 18th day of *May*, in the said year at *London* aforesaid, in the said parish and ward, by a written subscription with his own hand, under the said written protest, promised to pay the full contents of the said bill so protested, if it should not be paid in due time at *Amsterdam*. And by reason thereof, the said *Abraham*, according to the usage of merchants, aforesaid, became liable to pay the said 210*l.* last mentioned, to the said *Peter*, if they should not be paid in due time at *Amsterdam*. And thereupon the said *Abraham*, in consideration of the premises, the same day and year last above mentioned, at *London* aforesaid, in the said parish and ward undertook, and then and there faithfully promised, that he the said *Abraham*, the said 210*l.* last mentioned, would well and truly content and pay the said *Peter*, whenever after he should be thereto required, if the same should not be paid in due time at *Amsterdam* aforesaid. And the said *Peter* in fact saith, that the said 210*l.* last mentioned, were not paid in due time at *Amsterdam* aforesaid, according to the form and effect of the last mentioned bill of exchange; by reason of which, the said last mentioned bill of exchange afterwards, (*to wit*) the 6th day of *July*, in the year abovesaid, new stile, being the 25th day of *June*, in the same year *English* stile, was in due manner protested, according to the usage of merchants at *Amsterdam* aforesaid, for want of payment thereof and the same remains unpaid, (*to wit*) at *London* aforesaid, in the said parish and ward; whereof the said *Abraham*, afterwards (*to wit*) the 1st day of *October*, at *London* aforesaid, in the said parish and ward, had notice; nevertheless the said *Abraham*, *not regarding his promise and undertaking made in form aforesaid, but craftily and subtilly intending to deceive and defraud the said *Peter* in that behalf, the said *Peter* hath not paid the said several sums of money, or any part thereof, or in any manner howsoever satisfied him for the same, altho' often afterwards, (*that is to say*) on the 10th day of *October* in the year last mentioned at *London* aforesaid, in the said parish and ward, was requested by the said *Peter* so to do; wherefore the said *Peter* saith, that he is injured and endamaged to the value of 600*l.* and therefore brings his suit, and so forth.

That the Defendants subscribed to pay for the honour of the drawer. And thereby became liable. And being so liable, promised to pay, &c. That the money was not paid. And that the bill was protested.

P *III

JOHN

Actions on the Case.

JOHN THORPE against RICHARD THORPE.

Raym. Ent.
511.

Hillary, the eighth of King William the Third. Roll 1667.

Yorkshire. Richard Thorpe late of Hopton, in the said county gent. was attached to answer John Thorpe in a plea of trespass upon the case; and whereupon the said John, by H. H. his attorney complains, that whereas the said Richard on the 19th day of January, in the year of our Lord 1693, had and held, of and from the said John, two closes of customary land called *Bollfalls*, with the appurtenances in *Hipperholme* in the said county, by way of mortgage; and afterwards (*that is to say*) the same day and year at the castle of *York* there was a certain discourse had between the said R. and the said J. of and concerning the said mortgage, and releasing the equity of redemption of the said John, of and in the said tenements, with the appurtenances. And also of and concerning several sums of money then due and payable from the said John to the said Richard, and upon that discourse the said John then and there agreed to make a good and sufficient release of this equity of redemption, of and in the tenements aforesaid with the appurtenances to and for the use of the said Richard, and for his sole benefit; in consideration of which, the said Richard, then and there agreed to give and pay to the said John 7l. over and besides the money which was then due to said Richard, for and upon the said mortgage, and to deliver to the said John one sack of malt; and also to acquit him of and from all monies, which the said John then owed to the said Richard, as above. And the said Richard afterwards, (*that is to say*) the same day and year, at the castle of *York* aforesaid, in consideration of the said agreement, and also in consideration, that the said John had then and there undertook, and faithfully promised to the said Richard, to perform every thing in the said agreement, on the part of him the said John to be performed, he the said Richard undertook, and then and there faithfully promised the said John, that he the said Richard would well and truly perform every thing on his part to be performed. And the said John in fact saith, that after the making the said agreement, and before the issuing out of the original writ of the said John, (*to wit*) on the 29th day of July, in the year of our Lord 1694, he the said John performed every thing in the agreement on his part to be performed, (*that is to say*) at the castle of *York* aforesaid. And altho' the said Richard in pursuance of the said agreement, gave and paid to the said *John 25s. parcel of the said 7l. nevertheless the said Richard not regarding his said promise and undertaking made in form aforesaid, as to the 5l. 15s. residue

Declaration upon mutual promises upon an agreement, by which the plaintiff agrees to release to the defendant his equity of redemption in two closes, in consideration of which the defendant undertook to pay to the plaintiff 7l.
Lut. 245.

General averment of all to be performed on the part of the plaintiff.

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residue of the said 7l. but contriving and fraudulently intending craftily and subtilly to defraud and deceive the said *John* in this particular, hath not given or paid to the said *John* the said 5l. 15s. or any part thereof, nor hath delivered to the said *John* the said sack of malt, nor hath acquitted the said *John* of the said money, due to the said *Richard*, as above, according to the intent and purpose of the said agreement. Altho' the said *Richard* afterwards, (*that is to say*) on the 10th day of *August*, in the year last above mentioned, and often afterwards at the castle of *York* aforesaid, was by the said *John* thereto required, but altogether hitherto hath, and still doth yet refuse so to do. And whereas the said *Richard* afterwards (*that is to say*) on the 29th day of *January*, in the said year of our Lord, at the castle of *York* aforesaid, was indebted to the said *John* in 5l. 15s. of lawful money of *England*, for releasing the equity of redemption of the said *John*, of and in certain customary lands, with the appurtenances in *H*—in the county aforesaid, heretofore granted and pass'd to the said *Richard*, and to his use and benefit, at his special instance and request, and being so indebted, the said *Richard* afterwards, (*that is to say*) the day and year last aforesaid, at the castle of *York* aforesaid, in consideration thereof undertook, and then and there faithfully promised to the said *John*, that he the said *Richard* would well and truly content and pay to the said *John*, the said 5l. 15s. last mentioned, whenever he should be thereto required: nevertheless the said *Richard*, not regarding his promise and undertaking last mentioned, but contriving, and fraudulently intending, craftily and subtilly to defraud and deceive the said *John* in this particular, hath not given or paid to the said *John* the said 5l. 15s. or any part thereof; altho' the said *Richard*, afterwards (*that is to say*) on the 10th day of *August*, in the year last above mentioned, and often afterwards at the castle of *York* aforesaid, was by the said *John* requested thereto, but hitherto altogether hath, and still doth refuse so to do, to the damage of the said *John* 20l. and therefore he brings his suit, *and so forth*.

Declaration
upon an in-
debitat' as-
sumpsit for
a release of
the equity
of redemp-
tion.

And the said *Richard* by *Jos. Green* his attorney, comes and defends the force and injury when, *and so forth*. And as to the first promise aforesaid, the said *R.* saith, that the said *J. T.* ought not to have his action against him, because he saith, that after the making of that promise, (*that is to say*) on the 29th day of *July*, in the year of our Lord 1694, at the castle of *York* aforesaid, by a certain indenture then and there made between the said *R. T.* and one *T. H.* by the name of *R. T.* of &c. and *T. H.* of &c. of the one part, and the said *J.* by the the name of *J. T.* &c. of the other part, which other part sealed with the seal of the said *John* the said *T. R.* brings here into court, bearing date the day and year last mentioned, the said *John* remised, released, and for ever quit-claimed to the said *R. T.* and *T. H.* their executors, administrators, and assigns, all, and all manner of actions, suits, causes and accounts, debts,

Bar.
By the same
release by
which the
plaintiff re-
leased all
his enquiry
of redemp-
tion.

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debts, duties, reckonings, sum and sums of money and demands whatsoever, which he the said *J. T.* ever had, or which his heirs, executors, administrators and assigns, or any of them, then, or at any time then to come, thereafter should or might have, to, by or against the said *R. T.* and *T. H.* their executors, administrators or assigns, for, or by reason of any matter, cause, or thing whatsoever, as by the said indenture more fully may appear; and this he is ready to verify; wherefore he prayeth judgment, if the said *J. T.* ought to have his action against him, *and so forth.* And as to the second promise aforesaid, in the said declaration above mentioned, the said *R.* saith, that the said *J. T.* ought not to have his action against him thereof, because he saith, that the said promise was made before the said 29th day of *July*, in the year of our Lord 1694 aforesaid, (to wit) on the 1st day of *July* in the same year, at the castle of *York* aforesaid. And the said *R.* further saith, that on the said 29th day of *July*, in said year of our Lord 1694, at the castle of *York* aforesaid, by the said indenture, then and there made between the said *R. T.* and the aforesaid *T. H.* by the name of *R. T.* of, &c. of the other part, which other part sealed with the seal of the said *John*, he bringeth here into court, bearing date the day and year last above said, the said *John* remised, releaseth, and for ever quit-claimed, to the said *R. T.* and *T. H.* their executors, administrators and assigns, all and all manner of actions, suits, causes and accounts, debts, duties, reckoning, sum and sums of money and demands whatsoever, which he the said *J. T.* ever had, or which his heirs, executors, administrators and assigns, or any of them, then or at any time to come thereafter, should, or might have, to, by or against the said *R. T.* and *T. H.* their executors, administrators and assigns, for, or by reason of any matter, cause, or thing whatsoever, as by the said indenture more fully may appear; without that, that after the making the said indenture, he the said *R.* undertook, as by the said promise above is supposed. And this he is ready to verify, and therefore prayeth judgment, if the said *J. T.* ought to have his action against him, *and so forth.*

Com. 98.

1 L. Raym.
662.

Judgment was given in the Common Pleas for the plaintiff; and upon a writ of error in the King's Bench it was objected, that by the release this action was gone. But the opinion of the court delivered by my Lord Ch. Justice Holt was, that the release of the equity of redemption was the ground of the plaintiff's action: and therefore as a release of all demands, doth not release a covenant not broken, so neither doth this release this cause of action subsequent to the release, and which ariseth from the release itself. And tho' it was urged that these were mutual promises, and therefore the plaintiff might have an action before the making the release; and that in this case there need not be an allegation of the performance of the part of the plaintiff, yet the opinion of the court in this case was otherwise; and that this agreement that the plaintiff

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plaintiff should release the equity of redemption; was the consideration for which the defendant was to pay 7l. that the making of the release in this case, is a condition precedent to the payment of the money, and differs from the case of Nichols and Rainbred, in Hob. 88. where in consideration that Nichols promised to deliver to the defendant a cow, the defendant promised to deliver to him 50s. there it was adjudged that the plaintiff need not aver the delivery of the cow, because it was a promise upon a promise; and so another difference was taken to prove the judgment of the court. 15 H. 7. 10. B. A. Covenants to serve me one year, and I covenant to give him 20l. he may sue me for the 20l. tho' he never serve me a day; but otherwise shall it be if the agreement be that he shall have 20l. for serving me a year. And another difference was taken, that if by agreement a day certain be appointed for payment of money, and that day is to happen before the act can be performed, for which the money is to be paid; there altho' the words are, that one shall pay so much for the performance of such an act by another, yet the party may have an action for the money after the day appointed for the payment of it, and before the act be performed for which it was to be paid. 7 Cook 10. b. Another difference was taken, that if a certain day be appointed by agreement for the payment of money, yet if that day happen after the consideration be performed, there it ought to be averred, that the action was performed. Dyer 76. If a contract be made between two that for a horse of the one to be delivered at such a day, the other shall have his horse at Christmas, if the first be not delivered at that day, the other shall never have an action for the horse at Christmas.

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Lut. 251.

Devon (to wit) A. B. complains of G. D. the younger, in the custody of the marshal of the marshalsea of our sovereign Lord the King, before the King himself, for that whereas our said sovereign Lord the King that now is, had been seized in his demesne as of fee, in right of his crown of England, of the manor of G. with the appurtenances, in the parish of H. in the county aforesaid, whereof one messuage, one garden, one orchard, fifty acres of land, ten acres of meadow, ten acres of pasture, and twenty acres of furze and heath, with the appurtenances in D. in the said parish of H. are, and from the time whereof the memory of man is not to the contrary, were parcel: and whereas also the tenements aforesaid, with the appurtenances, are, and during all the time aforesaid have been customary tenements of the said manor, and demised and demisable by copy of court-rolls of the said manor or by the steward of the court of the said manor, to any person or persons whatsoever, willing to take the same to themselves, and their heirs, at the will of the Lord or Lady, according to the custom of the manor aforesaid. And our said sovereign Lord the King being so seized of the said manor, with the appurtenances, whereof the tenements above are parcel, our said sovereign Lord the King, that now is, at the court of his said manor, holden at the said manor (such a day and

Case for the tenant of a copyholder against another for digging of turf upon the common of the copyholder, by reason whereof the tenant could not enjoy the common for his cattle as before.

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year) by one E. P. Esq; then his steward of the court of the said manor, by copy of court-rolls of the same manor, granted the tenements aforesaid with the appurtenances, by the names of one messuage or tenement, (*so mention the parcels as in the grant*) to one J. S. gent. to have and to hold the same, to the said J. S. and his heirs, at the will of the Lord, according to the custom of the said manor; by virtue of which grant, the said J. S. entered into the said tenements, with the appurtenances, and was, and still is thereof seized in his demesne, as of fee, at the will of the Lord, according to the custom of the said manor. And whereas also, within the said manor, there is, and time out of mind hath been such a custom, that every customary tenant of the said manor, having, or holding any customary tenements of customary tenure, parcel of that manor, to him and *his heirs, at the will of the Lord, according to the custom of the said manor, during the time aforesaid, might, and have been accustomed to demise by his indenture, at his pleasure, his customary tenements of the same manor, or any parcel thereof, to any person, willing to take the same for the term of one and twenty whole years, from the making of such demise, or for a lesser term of years, at the will and pleasure of such customary tenants. And whereas also, within the said manor, there is, and during the time aforesaid hath been another custom, that the customary tenants of the said tenements aforesaid, whereof the said J. S. is seized in form aforesaid, to him and his heirs, according to the custom of the said manor, have had, and have been accustomed to have for themselves, their farmers and tenants, for terms of years, according to the custom of the said manor, common of pasture in a certain place, in the said parish of H. parcel of the said manor, called *Primrose Down* for all and all manner of their commonable cattle levant and couchant upon the said tenements, with the appurtenances, every year at all times of the year as appertaining only to the said tenements, with the appurtenances. And the said J. S. being so seized of the said customary tenements, with the appurtenances in form aforesaid, after the said grant thereof made to him in form aforesaid, that is to say, *such a day and year*, at H. aforesaid, by his certain indenture made between the said J. S. of the one part, and him the said A. of the other part (the other part whereof, sealed with the seal of the said J. S. the said A. brings here into court, the date whereof is the same day and year) demised to the said A. the said tenements, with the appurtenances (except as afterwards in the same indenture is excepted) by the name of all that messuage or tenement, &c. (except and always reserved out of the said demise and grant to the said J. S. his heirs and assigns, all and all manner of timber trees, *and whatever else is excepted in the deed*) to have and to occupy the said tenements, and other the premises, with the appurtenances (except before excepted) to the said A. and his assigns, from the feast of the annunciation

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annunciation of the Blessed Virgin *Mary* last past, before the date of the said indenture, for and during the term of five years from thence next ensuing, and fully to be compleat and ended, as by the said indenture amongst other things it may more fully appear: by virtue of which demise, the said *A.* entered into the said tenements, with the appurtenances (except before excepted) and was, and still is thereof possessed (except before excepted); and by virtue of the said demise, he ought to have and enjoy his said common of pasture, for all his said commonable cattle in and upon the said places called *Primrose Down*. Nevertheless the said *C. D.* not being ignorant of the premises, but endeavouring and intending unjustly to hinder and deprive the said *A.* of his said common of pasture, to be had in the aforesaid place called *Primrose Down* (*such a day and year*) and divers days and times, as well before the said *such a day* as afterwards, dug turfs, that is to say, ten thousand horse loads of turfs in the said place called *D.* and by the digging of the same turfs, and the laying and spreading of the same in several places in and upon the said place called *D.* trod down, consumed and spoiled the grafs there growing, whereby the said *A.* could not have his said common of pasture for his said *cattle levant and couchant upon the said tenements, with the appurtenances, in the said place called *D.* in such an ample and beneficial manner as he formerly had, and of right ought, and was accustomed to have, to the damage of the said *A.* of forty pounds, and whereupon he brings this suit, *and so forth.*

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OSBORNE against ROGERS, Executor of WESTON.

Easter, 21 Charles the Second. Roll 109.

London. Be it remembered, *and so forth.* [*here comes the remainder of the memorandum.*] *Robert Osborne*, gent. complains against an executor *George Rogers*, Doctor of Physic, executor of the last will and testament of *W. Weston*, gent. deceased in custody of the marshal of the *marshalsea*, of our sovereign Lord the King, being before the King himself, for that, whereas the said *Robert* had served one *John Weaver*, gent. for the space of three years, next before the 21st day of *March* 1647, and had acquired in such service the sum of 60*l.* yearly; and the aforesaid *Robert Osborne* so being in the service of the said *John Weaver* afterwards (that is to say the said 21st day of *March*, in the said year at *London* aforesaid, (that is to say) in the parish of *St. Dunstan's* in the west, in the ward of *Farringdon* without, a certain discourse was had and arose between the said *William* in his life-time, and one *Hellen Osborne*, mother of the said *Robert*, of and concerning the said *Robert*, and of and concerning the said *William's* taking the said *Robert* into his service. Whereupon the said *William* in his life-time, afterwards, (that is

Declaration against an executor that in consideration plaintiff had served the testator, that the testator undertook to provide for the plaintiff in a plentiful manner, and use him as his own son. 1 Sand. 264. 2 Keb. 525. And then to

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the plaintiff assigns a breach that he had not received any recompence of his service, except the sum of 20*l.* which was not sufficient.

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to say) the same day and year at *London* aforesaid, in the said parish and ward, in consideration that the said *Robert*, at the special instance and request of the said *William*, would serve the said *William*, and employ his care and industry, in and about the affairs of the said *William*, he the said *William* undertook, and then and there faithfully promised the said *Robert*, that he the said *William* would receive the said *Robert* into his service, and esteem him as the son of his own son, and plentifully provide for the said *Robert*. And the said *Robert* in fact says, that trusting to the promises and undertakings of the said *William*, made in the manner as above set forth, afterwards, (that is to say) the day and year aforesaid at *London* aforesaid, in the said parish and ward, he the said *Robert* came into the service of the said *William*, and served him from thence till the first day of *November*, in the 16th year of the reign of our sovereign Lord *Charles* the Second, now King of *England*, *Scotland*, *France* and *Ireland*, defender of the faith, and so forth, at *London* aforesaid, in the said parish and ward; and during all that time, employed his care and industry, in and about the affairs of the said *William*, with all possible diligence, without any wages, or salary given the said *Robert*, by the said *William* for the same; and that the said *William* afterwards, (that is to say) on the 9th day of *December*, in the eighteenth year of the reign of his said present Majesty, the said *William* died intestate at *London* aforesaid, in the said parish and ward, possessed of a real and personal estate, together amounting to the value of 3000*l.* and upwards, and had no children of his own. Nevertheless the said *William*, at the time of his death, or at any time in his life, after the making the said promise and undertaking, did not plentifully provide for the said *Robert*, nor gave him any recompence for his said service except the sum of twenty pounds, which was not a sufficient recompence for his said service, altho' the said *William* in his life-time, and the said *George* after his decease, (that is to say) on the first day of *January* in the 20th year of the reign of his said present Majesty at *London* aforesaid, in the said parish and ward, was often requested so to do by the said *Robert*. Whereby the said *Robert* saith he is injured and endamaged to the value of 1000*l.* and therefore he brings this suit, and so forth.

Plea, that true it is that the plaintiff came into the service of the testator the 6th of March 1647, and there continued till the last day

And now at this day, (that is to say) on *Wednesday* next after fifteen days of *Easter* this same term, (until which day the said *George* had leave to imparle to the said bill, and then to answer, and so forth), comes before our said sovereign Lord the King at *Westminster*, as well the said *Robert* by his said attorney, as the said *Geo.* by *A. Wellby* his attorney. And the said *Geo.* defends the force and injury, and the damages, and whatever else he ought to defend when and where this court shall please to take the same into consideration; and saith, that the said *Robert* ought not to have, or maintain his said action thereof against him, because he saith, that

right

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right and true it is, that the said *Robert* came into the service of the said *William*, on the said 21st day of *March*, in the said year of our Lord 1647, and continued in such service, till the last day of *December* 1658, during which said time, he the said *William* provided plentifully for the said *Robert*, with meat, and drink at *London* aforesaid, in the said parish and ward; and also paid to the said *Robert*, the sum of eight pounds of lawful money of *England* yearly for his salary. And the said *Geo.* further saith, that the said *Robert*, on the said last day of *December*, in the said year of our Lord 1658, at *London* aforesaid, in the said parish and ward, voluntarily left the service of the said *William*; without that, that the said *Robert* served the said *William* till the first day of *November*, in the 16th year of the reign of his present Majesty, as in the declaration of the said *Robert* above is mentioned. And this he is ready to verify; wherefore he prays judgment, if the said *Robert* ought to have or maintain his said action thereof against him, and so forth.

And the said *Robert* saith, that for any thing alledged by the said *Geo.* above in his plea, he the said *Robert* ought not to be precluded from having his action against the said *Geo.* Because he saith, that the said plea above pleaded by the said *Geo.* in manner and form aforesaid, and the matters therein contained, are not sufficient in law to preclude the said *Robert* from having his said action against him, nor is the said *Robert* under any necessity, or bound by the laws of this kingdom, to make any answer thereto; and this he is ready to verify. Wherefore for want of a sufficient plea in this particular, the said *Robert* prays judgment, and his damages to be awarded to him by reason of the premises, and so forth. And for causes of demurrer in law on the said plea, he the said *Robert*, according to the form of the statute in such case made and provided, doth here demonstrate, and shew to the court these causes following, (that is to say) for that the said *Geo.* hath in this case traversed a matter not traversable, and that the said plea is deficient in form, and so forth.

And the said *Geo.* saith, that the said plea above pleaded by the said *Geo.* in manner and form aforesaid, and the matters therein contained, are good and sufficient in law to preclude the said *Robert* from having his said action against the said *Geo.* which said plea, and matters therein contained, he the said *Geo.* is ready to verify and prove, as this court shall please to direct. And because the said *Robert* hath made no answer to the said plea, nor hitherto in any wise denied the same, he the said *Geo.* as above prays judgment; and that the said *Robert* may be precluded from having his said action against him, and so forth. But because the court of our sovereign Lord the King, now here, are not advised of giving their judgment of and upon the premises, a day therefore is given to the said parties, until *Friday* next after the morrow of the Holy Trinity for hearing

of *December* 1658, and that the testator did provide for the said plt. and paid 8l. yearly for his salary, and traverses, that the plt. continued to serve the testator till the 1st of *November*, in the 16th year of the King's reign.

Demurrer.

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Joinder in demurrer.

Continuance.

Actions on the Case.

hearing their judgment. Because the court of our said sovereign lord the King are not yet advised thereof, *and so forth*; at which day the said parties by their said attornies come before our sovereign Lord the King at *Westminster*. Whereupon all and singular the premisses being viewed, diligently inspected, and fully understood, with mature deliberation had thereon, by the court of our said sovereign Lord the King, here, in as much as it seems to the said court, that the said plea above pleaded in manner and form aforesaid, and the matters therein contained, are not sufficient in law to preclude the said *Robert* from having his said action against the said *Geo*. It is therefore considered, that the said *Robert* ought to recover his damages against the said *Geo*. by reason of the premisses. But because his said present Majesty's court here, know not what damages the said *Robert* hath sustained, by reason of the premisses, the sheriff is therefore commanded, that by the oaths of twelve honest, and lawful men of his bailiwick, he diligently enquire what damages the said *Robert* hath sustained, as well by occasion of the premisses, as for his expences and costs laid out by him, about his suit in this cause. And the inquisition which he should take, he should return to our sovereign Lord the King at *Westminster*, on *Friday* next after three weeks of the *Holy Trinity*, under his seal, and the seals of those by whose oaths he should make such inquisition, together with his said Majesty's writ directed to him for that purpose. The same day is given to the said *Robert* there, *and so forth*.

udgment.

The award
of the in-
quiry.

An exception was taken to this plea by the counsel for the plaintiff, that the defendant by his plea with the traverse, hath put but part of the time of the service in issue, (*that is to say*) whether the plaintiff served for any longer time than the last day of *December* 1658; so that all the time before, for which the plaintiff ought to have had recompence, the defendant had tendered no issue; and altho' the defendant hath alledged, that for that time the plaintiff had a recompence, yet that ought not to conclude the plaintiff, but that he might be let in to say, that he had not any such recompence, or that the recompence supposed by the defendant to have been given him was too small. But here the defendant by his traverse hath totally excluded the plaintiff from taking any such issue; therefore it is an ill plea.

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So in an action upon the case for stopping up three lights, the defendant justifies the stopping up of two, and traverses the stopping up of three. That is an ill plea, because the inducement goes but to part, (*that is to say*) two of the lights; and yet the traverse goes precisely to all the three; which ought not so to be; because if the defendant had stopped two only, and not three, yet the plaintiff, in an action upon the case, ought to recover damages for so many as he did stop up; therefore the defendant ought to have pleaded as to stopping up one of the lights he was not guilty; and as to the other two, he ought to have justified.

1 Saund 22.
3 Lev. 227.
Cro. Eliz.
99. 667.
Cro. Car.
278.
Lut. 299.
468, 469.
2 Saund.
207, 219.
1 Lev. 98.
10 Co. 116.

Michaelmas,

Actions on the Case.

Michaelmas, the Eighth of KING GEORGE.

London (to wit) : William Rhodes of London, gent. was attached Upon an
to answer to Nathan Jacobs of a plea of trespass upon the case; agreement
and whereupon the said Nathan, by Gravely Norton, his attorney, to transfer
complains, that whereas the twenty sixth day of August, in the year London
of our Lord one thousand seven hundred and twenty, at London Assurance
aforsaid, in the parish of St. Michael Cornhill, in the ward of Stock.
Cornhill, it was agreed between the said William and Nathan,
that the said Nathan should transfer, or cause to be transferred to
the said William one thousand pounds credit in the stock of a
certain company, commonly called the London Assurance, at and That it was
upon the then next opening of the books for transferring the stock, agreed, that
and should pay to the said Nathan, at and according to the rate the plain-
of ninety five pounds of lawful money of Great Britain, for every tiff should
hundred pounds of the said one thousand pounds credit in the stock transfer the
aforsaid, in the whole amounting to nine hundred and fifty pounds. next open-
And thereupon the said William afterwards, (to wit) upon the said a price.
twenty sixth day of August, in the year aforsaid, in London aforsaid,
in the said parish and ward, in consideration that the said
Nathan then and there, at the special instance and request of the
said William, undertook, and then and there faithfully promised
the said William, that he the said Nathan would well and truly
perform, and faithfully fulfil all and singular the matters and things That in
contained in the said agreement on his part, to be performed and consideration
fulfilled, the said William then and there undertook, and to the the
said Nathan faithfully promised, that he the said William would plaintiff
well and truly perform and faithfully fulfil all and singular the would per-
matters and things contained in the said agreement, on the part of form the
the said William to be performed and fulfilled. And the said agreement
Nathan saith, that the first day of opening the said books for trans- on his part,
ferring the said stock, after the said agreement made as above, the defen-
was the fifth day of September, in the year of our Lord aforsaid; perform it
and that at that time, and long before and always afterwards on his part.
hitherto, the only place for transferring the aforsaid stock, hath An Aver-
been and now is at a certain house, commonly called the London transfer- ment of the
Assurance-Office, situate in the parish and ward aforsaid, whereof ring. The
the said William then and there had notice; and that the only proper
for transferring of stock on the said fifth day of September, in the hours for
*year aforsaid, and long before, * and always afterwards hitherto transfer-*
*have been, and now are, between the hour of nine in the forenoon, P * 120*
and the hour of one in the afternoon. And that the said Nathan That the
on the said 5th day of September, in the said year of our Lord being plaintiff
the was there

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ready for
that pur-
pose.

Laid ano-
ther way.

the day of transfer came there at the said house, commonly called the *London Assurance-Office* (to wit) at the hour of nine in the forenoon, and remained there till the hour of one in the afternoon of the same day; and during all that time was ready, and offered to transfer the said 100l. credit in the said stock to the said *W.* and to receive of the said *W.* the sum of 950l. according to the rate of 95l. for every 100l. of the aforesaid 1000l. credit in the said stock. And that the said *W.* the said 5th day of *September*, in the year aforesaid, or at any other time hath not accepted the said 1000l. credit in the aforesaid stock, according to the said agreement, in the whole amounting to 950l. or any part thereof, altho' the said *W.* afterwards (*that is to say*) on the said 5th day of *September*, and several times afterwards, at the parish and ward aforesaid, was by the said *Nathan* requested so to do, but hath altogether refused to accept the said stock from the said *Nathan*, or to pay for the same. And whereas the said *William* afterwards (*that is to say*) the said 26th day of *August* in the said year, at *London* aforesaid, in the parish and ward aforesaid, bought of the said *Nathan* another 1000l. credit in the stock of the said company, at and according to the rate of 95l. of like lawful money for every 100l. of the said 1000l. credit in the said stock, amounting in the whole to another 950l. to be paid to the said *Nathan* upon the transfer of the said stock last mentioned to be made by the said *Nathan* to the said *William*, at the next opening of the books for the transfer of the said stock last mentioned; and in consideration that the said *Nathan*, at the special instance and request of the said *William*, did then and there undertake, and faithfully promise to transfer to the said *William* 1000l. credit in the said stock, at and according to the said price last mentioned, upon the then next opening of the books for the transferring of the stock last mentioned, he the said *William* then and there undertook, and faithfully promised the said *Nathan*, that he the said *William* would accept the said 1000l. stock last mentioned, from the said *Nathan*; and upon the transfer of the same, would well and truly content and pay for the same to the said *Nathan*, according to the said rate and price last mentioned; and the said *Nathan* in fact saith, that the first day of the opening of the transfer books of the said company, after the said agreement, was on the 5th day of *September* in the said year of our Lord; and that the only place for transferring the said stock the said 5th day of *September*, and long before, and continually afterwards hath been, and yet is at a certain house called the *London Assurance-Office*, in the parish and ward aforesaid; and the only hours for transferring the said stock on the said 5th day of *September*, and always hitherto have been, and now are, between the hours of nine in the forenoon, and the hour of one in the afternoon of the same day. And that he the said *Nathan* on the said 5th day of *September*, in the year aforesaid, came to the said house, commonly called the *London Assurance*

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Assurance-Office, at the said hour of nine in the forenoon, and tarried there till, and after the said hour of one in the afternoon; and during all that time was there ready, and offered to transfer the said 1000l. *credit in the said stock, and to receive from the said *William* P *121 the said 950l. for the same. And that the said *William*, on the said 5th day of *September* in the year aforesaid, did not, or at any other time, hath accepted the said 1000l. credit last mentioned in the said stock, or paid to the said *Nathan* the said 950l. last mentioned, or any part thereof, although the said *William* afterwards (to wit) on the same 5th day of *September*, and often afterwards at *London* aforesaid, in the said parish and ward, was requested by the said *Nathan* so to do, but altogether hitherto hath, and still doth refuse to accept from the said *Nathan* the said stock, or to pay for the same. Wherefore he the said *Nathan* saith, that he is injured, and endamaged to the value of 1000l. and therefore brings this suit, *and so forth*.

Norfolk. *W. J.* late of *Thetford* in the said county, was attached Declaration to answer *J. G.* executor of the last will and testament of *R. G.* of in trover a plea of trespass on the case, *and so forth*. And whereupon the brought by said *J.* by *H. S.* his attorney complains, that whereas the said *R.* in executor for cattle his life time (that is to say) the 20th day of *September*, in the 5th for cattle lost in the year of the reign of our sovereign lord the king at *Thetford* afore-life-time of said, had been possessed of certain cattle (that is to say) one bull the testator. (so mentioning the rest of the cattle as of his own proper cattle) and being so possessed thereof afterwards (that is to say) the same day and year at *T.* aforesaid, casually lost the said cattle out of his hands and possession; which cattle afterwards in the life time of the said *R.* (that is to say) on the said 20th day of *September* in the said year at *T.* aforesaid, came to the hands and possession of the said *W.* by his finding the same. Nevertheless the said *W.* knowing the said cattle to be the proper cattle of the said *R.* and of right to belong and appertain to him the said *R.* in his life time, and intending craftily and subtilly to deceive and defraud the said *R.* in his life time in this behalf, hath not delivered the said cattle to the said *R.* (although the said *W.* was by the said *R.* in his life time often thereunto required) but the said *W.* afterwards in the life time of the said *R.* (that is to say) the 25th day of *September*, in the fifth year aforesaid, at *W.* aforesaid, converted and disposed of those cattle to the proper use and benefit of the said *W.* to the delay of the execution of the testament aforesaid, and to the damage of the said *J.* of 40l. and thereof he brings his suit, *and so forth*. And he brings here into court the letters testamentary of the said *R.* by which it may appear to the court, that he is executor of the said will, and hath the administration thereof, *and so forth*.

Norfolk. *A. B.* complains of *C. D.* in the custody of the mar- For ob-
shal, *and so forth*, for that whereas one *W. W.* gentleman, had been structing
seised in his demesne as of fee, of and in the manor of *D.* with the plaintiff of
his com-
appurtenances mon.

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P *122 appurtenances in *D.* in the county aforesaid; and he the said *W.* being so seized, the said *W.* and his ancestors, and all those whose estate the said *W.* now hath, of and in the said manor with the appurtenances had, and from the time of which the memory of man is not to the contrary, have been accustomed to have for their farmers and tenants of his said manor, common of pasture in a certain place called *Jagger-Holes* in *D.* aforesaid, containing three acres of pasture, for all his cattle *Levant* and *Couchant* within the said manor, * at all times of the year, belonging and appertaining only to the said manor. And the said *W.* being so seized of the said manor, with the appurtenances in form aforesaid, the said *W.* the twenty first day of *April*, in the said year aforesaid, (at such a place) demised, granted, and to farm let the said manor, with the appurtenances, to the said plaintiff, to have and to hold the said manor, with the appurtenances, to the said plaintiff, his executors, administrators and assigns, from the said twenty-first day of *April*, in the year aforesaid, until the full end and term of twenty one years, by virtue of which said demise, the said plaintiff entered into the said manor aforesaid, with the appurtenances, and was thereof and yet is possessed. Nevertheless the said defendant not ignorant of the premises, but contriving and intending to hinder and deprive the said plaintiff of his said common of pasture in the said place called *J.* he the said defendant inclosed the said place called *Jagger-Holes*, with hedges and ditches, so that the said plaintiff could not put and drive his cattle into the same place called *J.* to feed the grass there growing; by which the said plaintiff not only was excluded and hindered of his said common, in the said place called *J.* but the said plaintiff totally was deprived of, and lost great gains, profits and advantages, which he ought to have had and gained by his said cattle depasturing and feeding the grass growing in the said place called *J.* to use his common aforesaid, if the said defendant had not inclosed the said place with hedges and ditches. Whereupon the said plaintiff saith, that he is injured and endamaged to the value of one hundred pounds, and therefore brings his suit, *and so forth.*

A declaration in
case for en-
ticing a ser-
vant away
from the
plaintiff,
and receiv-
ing her into
his service.

Whereas one *Mary B.* on the 28th day of *October*, in the year of our Lord 1731 at *Westminster*, in the said county of *Middlesex*, was rightfully and lawfully retained into the service of the aforesaid plaintiff to serve him in and about all his lawful and honest affairs and businesses whatsoever for one whole year then next following; and the same *M.* being so retained, continued in the service of the said plaintiff for the space of nine months. And during that time the said *M.* so served the said plaintiff, she diligently employed herself in the service of the said plaintiff, and thereby became capable of serving the said plaintiff in very important affairs and businesses of great concern of the said plaintiff. And the said *B.* by

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by the occasion of instructing her during that time, sustained no small labour and expence. Notwithstanding, the aforesaid defendant, not ignorant of the premisses, but craftily and subtilly intending to deceive and defraud the said plaintiff, of all the profits and advantage, which the said plaintiff should have received, by reason of the service of the said *M.* for the time she was retained as above, on the first day of *June*, in the year of our Lord 1732, at *Westminster* aforesaid, in the county aforesaid, the said *R.* incited and procured the said *M.* then servant to the said plaintiff, to depart and leave the service of the said plaintiff; by means of which inciting and procuring the said *M.* to depart from the service of the said plaintiff, afterwards, (*to wit*) on the said first day of *March*, in the year last above mentioned at *Westminster* aforesaid, in the county aforesaid, the said *M.* departed and left the said service of the said plaintiff, without the leave, and contrary to the will and consent of the said plaintiff; *and the said defendant afterwards, (*to wit*) on the same first day of *March*, in the year last mentioned, knowing the said *M.* to be the servant of the said plaintiff at *Westminster* aforesaid, in the county aforesaid, admitted and received the said *M.* into the service of the said defendant; by which the said plaintiff lost all the profit, benefit and advantage which he would have had, by reason of the service of his said servant, for the residue of the said term. Wherefore the said plaintiff saith that he is injured, and sustains damage, to the value of ten pounds, and therefore brings his suit, and *s. forth*.

T. B. complains of *W. R.* tanner, in the custody of the marshal, and *so forth*, for that whereas the said *W.* such a day, and year, and place, had agreed with him the said *T.* to buy the hides and skins of all and singular the oxen, horses, cows and calves, which he the said *T.* from the said (*such a day*) until (*such a day*) then next following, should happen to kill or slay, the said *W.* in consideration thereof undertook, and then and there faithfully promised the said *T.* that he the said *W.* would well and truly pay to him the said *T.* for every hide of each ox or heifer, by him the said *T.* within the time aforesaid killed or slain, and by him the said *T.* to him the said *W.* within that time, delivered, three shillings and four pence; and for every hide of a cow, by him the said *T.* within the said time killed and delivered as aforesaid, two shillings; and for every dozen of calve-skins by him the said *T.* within the time aforesaid, killed and delivered, as aforesaid, four shillings. By reason of which said promise and undertaking of him the said *W.* made as above, he the said *T. B.* delivered to the said *W.* five hundred and three hides of oxen and heifers, and fifty two hides of cows, and fifty dozen of calve-skins killed by him the said *T.* within the time aforesaid, according to the tenor of the said bargain, at divers days and times within the time aforesaid at *S.* aforesaid, the true value and price whereof delivered, as above, according to the said bargain, amounted

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amounted unto the sum of eighty eight pounds, sixteen shillings, and ten pence. Nevertheless the said *W.* contriving and fraudulently intending, craftily and subtilly to deceive and defraud the said *T.* in that particular, altho' the said *W.* (*such a day and year*) and afterwards at *S.* aforesaid, hath been required to pay to him the said *T. B.* the aforesaid eighty-eight pounds, sixteen shillings and ten pence, according to the said bargain. Yet he the said *T. B.* hitherto hath not paid the same, or any part thereof, but hitherto altogether hath, and still doth refuse so to do, to the damage of the said plaintiff one hundred pounds; and therefore he brings his suit, *and so forth.*

A declaration upon a promise to pay the plaintiff a sum of money for procuring of stock to be transferred, and another sum for his expences and trouble therein.

P * 124

Middlesex. *William Highmore* late of *Westminster* in the said county, gent. was attached to answer to *Richard Nicholson*, of a plea of trespass on the case, *and so forth.* And whereupon the said *Richard* by *John Ferrett* his attorney complains, that whereas on the 31st day of *January*, in the year of our Lord 1725 at *Westminster*, in the said county of *Middlesex*, a certain discourse arose, and was had between the said *Richard* and the said *William*, of and concerning three hundred pounds stock in the capital united stock of the *East India* company, belonging to one *Isabella Wybergh* widow, as executrix of *Thomas Wybergh* her son, then lately deceased, and of and concerning the transferring of the same stock by the said *W. H.* by virtue of a certain letter of attorney made by the said *Isabella* before that time, to the said *W.* And upon that discourse it was then and there agreed between the said *Richard* and *William*, that the said *Richard* should endeavour to procure a liberty and license, to the said *William Highmore*, to transfer the said 300l. in the capital stock of the said company, by virtue of the said letter of attorney; and that the said *William* should pay to the said *Richard*, or his order, the sum of one hundred and fifty pounds for his pains and trouble therein, and ten pounds for the same, expences and charges of the said *Richard*, laid out and employed, in and about such transfer of the said stock, and the procuring of the same, as aforesaid. And thereupon, in consideration that the said *Richard* had undertaken, and then and there had promised to perform that agreement in every thing on his part to be performed, the said *William* then and there undertook, and to the same *Richard* faithfully promised, that he would perform all and every thing in the said agreement contained on his part to be performed. And the said *Richard* in fact saith, that he the said *Richard* afterwards, (*that is to say*) the day of in the year of our Lord 1725, at the special instance and request of the said *W.* endeavoured to procure such leave and license for the said *William*, to transfer the said three hundred pounds capital stock aforesaid, of the said company, by virtue of the said letter of attorney; and then and there procured liberty and licence to the said *William*, to transfer the said three hundred pounds capital stock, in the stock of the

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the said company, by virtue of the said letter of attorney accordingly; and the said *Richard* afterwards, (*that is to say*) the same day and year last mentioned, at *Westminster* aforesaid, gave an account thereof to the said *William*, and requested the said *William* to pay to the said *Richard*, the said sum of one hundred and fifty pounds, and ten pounds contained in the said agreement. Nevertheless the said *William* hath not paid the said sum of money contained in the said agreement, or any part thereof to the said *Richard*, but then and there, and always afterwards hitherto hath, and still doth refuse so to do. And whereas on the said 31st day of *January*, in the year aforesaid, at *Westminster* aforesaid, in the county of *Middlesex*, in consideration that the said *Richard* then and there had undertaken, and then and there promised to the said *William*, that he said *Richard* would procure other three hundred pounds capital stock, then being in the stock of the *East India* company, belonging to the said *Isabella Wybergh*, to be transferred in the transfer-books of the said company, kept for that purpose, according to the manner of transferring the said stock of the said company, at the instance of the said *William*, by virtue of a certain letter of attorney, before that time made by the said *Isabella* to the said *William*, he the said *William* in consideration thereof undertook, and then and there faithfully promised, that he the said *William* would pay to the said *Richard*, or his order, the sum of one hundred and fifty pounds for his industry, and the further sum of ten pounds for his expences, time and trouble, in and about transferring thereof, whenever he should be thereto requested; and the said *Richard* afterwards, (*that is to say*) the day and year aforesaid, at *Westminster* aforesaid, requested the said *William* to pay him the said sum of one hundred and fifty pounds, and ten pounds according to his said promise; Nevertheless the said *William* not regarding his said promises and undertakings last mentioned, made in form aforesaid, but contriving, and fraudulently intending craftily and subtilly to deceive and defraud the said *Richard* in this particular, hath not paid to the said *Richard*, the said one hundred and fifty pounds, and the said sum of ten pounds, or any part thereof, altho' often requested thereto, but hath altogether refused, and doth yet refuse so to do, to the damage of the said *Richard* 26*ol.* and therefore he brings this suit, and so forth.

And further, the declaration sets forth, that the defendant was indebted to the plaintiff, in the sum of one hundred and sixty pounds, for so much money lent by the plaintiff to the defendant, and being so indebted, that he promised to pay, &c. Wherefore the said *Richard* saith, that he is injured, and sustains damage to the value of one hundred and sixty pounds; and therefore brings this suit, and so forth. This declaration was drawn by *Sergeant Branthwayte*.

Laid another way.

P *125

STINTON

Actions on the Case.

STINTON against YATES.

Hillary, the thirty sixth and thirty seventh of King *Charles* the Second.

An action upon the case upon an assumption concerning the maintenance of a bastard. Lut. 1222. N. L. 68. reciting the maintenance.

The communication about the same.

The special agreement made upon such communication.

P * 1 26

Punctual promises.

Mary Yates, late of the city of *Worcester*, in the county of the city of *Worcester*, widow, was attached to answer to *Rowland Stinton* of a plea of trespass upon the case, and so forth; And whereupon the said *Rowland* by *Thomas Twittye* his attorney complains, that whereas *Richard Yates*, son of the said *Mary Yates*, had procured and obtained carnal knowledge and copulation of one *Johanna Stinton*, daughter and servant to, and dwelling with the said *Rowland*, and got the said *Johanna* with a male child, which said *Johanna* was afterwards delivered of such male child; and the said *Rowland*, in order to keep himself from the maintenance of the infant, intended to prosecute the said *Richard* for getting the said infant, upon the body of the said *Johanna*, as above. And the aforesaid *Mary* desiring to compose the difference aforesaid, on the 12th day of *February* in the 35th year of the reign of his present Majesty, at *Claynes* in the county aforesaid, at the request of the said *Mary*, a certain discourse was had, and arose between the said *Mary* and the said *Rowland*, of and concerning the maintaining the said infant, so begotten by the said *Richard*, on the body of the said *Johanna* as aforesaid; upon which discourse, afterwards (to wit) on the same 12th day of *February*, in the 35th year aforesaid, at *Claynes* aforesaid, it was agreed between the said *Rowland* and the said *Mary*, in manner and form following, (*that is to say*) that if the said *Rowland* would undertake to keep and maintain the said infant for five or six years, and not prosecute the said *Richard*, then the said *Mary* would pay to the said *Rowland* 10l. of lawful money of *England*, whether the infant should live or die, in manner and form following, (*that is to say*) one shilling in hand, and ninety nine shillings more, parcel of the said money, upon *Thursday* in the then next following week, and the five pounds residue of the said 10l. at 20s. a year, which said sum of 5l. the said *Mary* would well and truly secure by a bond to be entered into by one *Robert Yates*, and *Edward Yates*, two sons of the said *Mary*; and after the expiration of the said five or six years, the said *Mary* would maintain the said infant at her own proper costs and charges. And thereupon the said *Mary*, afterwards, (*that is to say*) on the said 12th day of *February*, in the 35th year aforesaid, at *Claynes* aforesaid, in consideration that he the said *Rowland*, at the special instance

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stance and request of the said *Mary*, and then and there had, well and truly undertook, and faithfully promised to the said *Mary*, to perform the said agreement in every thing on his part to be performed, she the said *Mary* undertook, and then and there faithfully promised to perform the said agreement in every thing on her part to be performed. And the said *Rowland* in fact faith, that he the said *Rowland* trusting to the promise and undertaking of the said *Mary* as above, the said *Rowland*, at the special instance and request of the said *Mary*, afterwards, (*to wit*) on the said 12th day of *February*, in the 35th year aforesaid, and from thence hitherto maintained the said infant, and never prosecuted the said *Richard* for the same. Nevertheless the said *Mary*, not regarding her undertaking and promise aforesaid, but contriving, and fraudulently intending, craftily and subtilly to defraud and deceive the said *Rowland*, hath not paid the said ninety nine shillings, parcel of the said ten pounds, upon the *Thursday* last above mentioned, nor hath secured to the said *Rowland* the five pounds, residue of the said ten pounds, by bond of the said *Robert* and *Edward*, to the said *Rowland*. Altho' the said *Mary*, afterwards (*to wit*) on the 10th day of *October*, in the said 35th year of the reign of our sovereign Lord the King, that now is, and several times after, at *Claynes* aforesaid, hath been by the said *Rowland* thereto required, but hitherto she altogether hath, and still doth refuse so to do, to the damage of the said *Rowland* 20l. And therefore he brings his suit, and so forth.

The breach.

An exception was taken to this declaration, that there was not a sufficient averment that he had promised he would maintain the child for five or six years; and that it was a condition precedent to all the agreement, and not sufficiently expressed; but the court held the declaration to be good, for the mutual promise of the plaintiff to the defendant was a good consideration. Lut. 224.

Derby (*to wit*): *J. S.* complaineth of *G. C.* in the custody of the marshal, and so forth, that whereas the said *J.* on the third day of *March*, in the fifth year of the reign of our sovereign Lord *George* the second, King of *Great Britain*, and so forth at *Westminster*, in the county aforesaid, at the special instance and request of the said defendant, agreed with the said defendant, and faithfully promised to him, that he the said plaintiff would not further prosecute the said defendant in a suit which was then depending in the court of our late sovereign Lord *George*, late King of *Great Britain*, before the said late King himself, for a certain trespass which the said defendant then and there acknowledged to be committed by the said defendant, against the said plaintiff, in certain lands and tenements of the said plaintiff in (*to wit*) a messuage, and twenty acres of bench for a land trepafs.

A declaration upon a promise to pay 40l. to the plaintiff in consideration the said plaintiff would not further prosecute a suit then begun in the court of common

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P *127 *land in *W.* in the county aforesaid, the said defendant then and there, in consideration thereof undertook, and then and there faithfully promised to the said plaintiff, that he the said defendant would well and faithfully pay to the said plaintiff, the sum of seventeen pounds of lawful money of *Great Britain*, in discharge and satisfaction of the said trespass, before the feast of *Easter* then next following. And the said plaintiff in fact saith, that he trusting to the said promise of the said defendant, hath not hitherto, since the making of the said promise, further prosecuted the said defendant for the trespass aforesaid. And the said plaintiff in fact saith, that the said feast of *Easter* then next following the making the said promise of the defendant, to the said plaintiff as above, was on the day of _____ in the said fifth year of the reign of our sovereign lord the king that now is. Notwithstanding the said defendant, not caring for, or regarding his said promise, but contriving, and fraudulently intending in this behalf, craftily and subtilly to deceive and defraud the said plaintiff; the said defendant hath not yet paid to the said plaintiff the said sum of forty pounds, or any part thereof; although the said defendant, afterwards (*that is to say*) on the first day of *May* in the said fifth year of the reign of our sovereign lord the king that now is, and often afterwards (*to wit*) at *Westminster* aforesaid, in the county aforesaid, hath been requested so to do, but hath altogether hitherto denied, and yet doth deny to pay the same to the said plaintiff; wherefore he saith that he is injured, and sustains damage, to the value of twenty pounds; and therefore brings this suit, *and so forth.*

For excessive working the plaintiff's mare.

That whereas the said *B.* such a day and year at *C.* in consideration that the said *A.* at the special instance and request of the defendant, had delivered at *M.* the mare of the said plaintiff, to till and plow certain lands of the said defendant in *P.* for and during the space of ten days then next following, the said *B.* undertook, and then and there faithfully promised the said defendant, he would redeliver the said mare safe and sound to the said plaintiff, after the end of the aforesaid ten days, upon demand; nevertheless the said (defendant) contriving and intending to deceive and defraud the said plaintiff, did so excessively, and inordinately labour and tire the said mare, in the ten days, so that by such excessive working the said mare died, to the damage of the plaintiff twenty pounds; and thereupon he brings this suit, *and so forth.*

A declaration in case for annoying the plaintiff by erecting a lime-kiln near the messuage of the plaintiff. *A. B.* complains of *E. F.* in the custody of the marshal, *and so forth*, for this cause (*to wit*) that whereas the said *A. B.* on the tenth day of *October*, in the fifth year of the reign of his present majesty, *George* the second, king of *Great Britain*, *and so forth*, was, and for many years then next before had been, and also now is seised in his demesne as of fee (*or possessed for a term of years, as the case is*) of and in a messuage and garden, with the appurtenances in *London*, (*that is to say*) in the parish of *St. Michael Queenhithe*, in the

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the ward of *Queenhithe*. And being so seised (or possessed) the said *E. F.* the day and year abovesaid, and many other days and times between that day and the first day of *January* the next following, contriving to deprive the said *A. B.* of the whole profit, *advantage and easement of the said *A.*'s messuage and garden at *London* abovesaid, in the parish and ward abovesaid, in a certain place called *B.* in the said parish of *Queenhithe*, in the said ward of *Queenhithe*, the said *E. F.* burnt chalk in a certain furnace, called a lime-kiln, to make lime thereof; by reason of which, the stinking and unwholesome fume or smoke arising therefrom, came upon the said messuage and garden of the said *A. B.* and penetrated into the herbs and fruits at that time there growing and being; by which not only the herbs and fruits then growing became dry, withered and dead, but also the said *A. B.* from the said first day of *March*, in the said fifth year of the reign of his said present majesty, to the said first day of *April* then next following, totally lost the whole easement, profit and advantage of his said messuage and garden, to the great damage and wrong of the said *E. F.* Wherefore the said *E. F.* saith, that he is injured and endamaged, to the value of five hundred pounds; and therefore brings this suit, and so forth.

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Suffolk (to wit): Richard Holbridge, late of *Combes* in the said Special county, yeoman, executor of the last will and testament of *Francis* mise touch-
Holbridge, was attached to answer to *John Guiser* of a plea of tres- ing money
pass upon the case, and so forth; and whereupon the said *John*, by mar-
Barnaby Gibson his attorney complains, that whereas the said *Francis* riage.
in his life-time, (*that is to say*) on the 20th day of *September*, in the 21st year of the reign of his present Majesty, at *Mendlesham*, in consideration that the said *John*, at the special instance and request of the said *Francis*, married one *Cooper*, then wife to the said *John*, undertook, and then and there faithfully promised the said *John*, that he the said *Francis* would give to the said *John* two hundred pounds, to be paid to the said *John*, his executors or administrators, at the death of the said *Francis*, by the executors of the last will and testament of him the said *Francis*, made and appointed by him the said *Francis*, when the same executors were by the said *John* thereto required. And the said *John* in fact saith, that he, giving credit to the said promise and undertaking of the said *Francis* at the special instance and request of him the said *Francis*, afterwards in the life time of the said *Francis*, (*that is to say*) on the 22d day of *September*, in the said 21st year at *Mendlesham* abovesaid, married the said *Elizabeth*, and the espousals between the said *John* and the said *Elizabeth* were then and there had and solemnized; whereof the said *Francis* in his life time, and the said *Richard*, after the death of the said *Francis*, had notice (*that is to say*) at *Mendlesham* abovesaid: Nevertheless the said *Francis* in his life time, and the said *Richard* after his decease, not
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regarding the said promise and undertaking of the said *Francis*, made as above, but the said *Francis* in his life time, and the said *Richard* after his decease, fraudulently intending to deceive and defraud the said *John*, the said *Francis* at the time of his death, did not give the said *John* the said two hundred pounds, nor hath the said *Richard* paid to the said *John* the said two hundred pounds, or made him any satisfaction for the same in any manner howsoever, although the said *Richard*, after the death of the said *Francis*, (*that is to say*) on the tenth day of *June*, in the fifth year of the reign of his present Majesty at *Mendlesham* aforesaid, by the said *John* was thereto required, but hath altogether refused, and still doth refuse to pay the said two hundred pounds, or to make the said *John* any satisfaction for the same, to the damage of the said *John* two hundred and twenty pounds; and therefore he brings this suit, and so forth.

A declaration for printing the plaintiff's copy of the Pilgrim's Progress without his leave.
Lilly 67.

London. Nathaniel Fonder complains of *Thomas Braddill*, in the custody of the marshal of the *marshalsea* of our sovereign lord the king, being before the king himself; for that whereas on the first day of *May* in the thirtieth year of the reign of his present majesty *Charles* the second, king of *Great Britain*, and so forth, the said Nathaniel was, and continually afterwards hitherto hath been, and now is the true owner and proprietor of the copy of a certain book, intituled *the Pilgrim's Progress from this world to that which is to come, delivered under the similitude of a dream, wherein is discovered, the manner of his setting out on his dangerous journey, and safe arrival at the desired country*, by *John Bunyan*; and that he the said Nathaniel, after he so became a proprietor of the said book, he printed off 2000 books of the same copy; and on the twentieth day of *January*, in the thirtieth year of the reign of his said present majesty, he had in his hands at *London* aforesaid, in the said parish and ward, an hundred books, or more, of that impression; and on the same twentieth day of *January*, in the thirtieth year aforesaid, at *London* aforesaid, in the said parish and ward, was imprinting 4000 books more of the same copy. Nevertheless the said *Thomas* well knowing the premises, but contriving and fraudulently intending wholly to deprive the said Nathaniel of all the benefit of his said copy, afterwards (*that is to say*) on the same twentieth day of *January*, in the thirtieth year aforesaid, at *London* aforesaid, in the said parish and ward, without the leave and consent of the said Nathaniel, did print, and then and there expose to sale, four thousand books of the said book of the said Nathaniel, intituled, *the Pilgrim's Progress from this world to that which is to come, delivered under the similitude of a dream; wherein is discovered the manner of his setting out on his dangerous journey, and safe arrival at the desired country*, by *John Bunyan*; whereby the said Nathaniel lost, and was deprived of all the profit, benefit, and advantage of his said book, intituled, *the Pilgrim's Progress from this world to that which is to come, delivered under the*
similitude

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similitude of a dream ; wherein is discovered the manner of his setting out on his dangerous journey, and safe arrival at the desired country, by John Bunyan ; whereby the said Nathaniel saith, he is injured and endamaged to the value of 200l. and therefore he brings this suit, and so forth.

* LANGHTON against WARD.

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Trinity Term, in the Seventh of King William the Third.
Roll 1703.

Yorkshire. Thomas Ward, late of Tickhill, in the said county, yeoman, was attached to answer to William Langhton, gentleman, of a plea of *trespass on the case, and so forth.* And whereupon the said William by A. B. his attorney, complains, that whereas on the 10th day of May, in the sixth year of the reign of our sovereign lord king William, and lady Mary, late king and queen of England, and long before he had, and continually afterwards hitherto hath been, and is now seised of, and in a close of land, with its appurtenances called *Langdale*, lying and being in the parish of *Tickhill* aforesaid, and of a close of meadow ground called *Good, Ing*, lying and being in the said parish and contiguously adjoining to the said close called *Langdale*, in his demesne as of fee ; and the said William Langhton, and all those whose estate he the said William now hath, and during all that time had, of and in the tenements aforesaid, with their appurtenances, time out of mind have had, and were used and accustomed to have a certain way, as well a foot as a horse way, for his carts and carriages, from the common highway, in the said parish of *Tickhill*, (which said highway was leading from the towns of *Tickhill* and *Wadworth* in the said county) in, by and through a certain place called *Badfley-well lane*, lying between the said parish of *Tickhill*, and so in and through a certain other place called *Langdale's lane*, and from thence to, by and through the said close called *Langdale*, and so back again from the said close to the said highway, every year, at all times in the year, through the way described, in the manner as above, belonging only to his said tenements with their appurtenances. Nevertheless the said Thomas, well knowing the premises, but contriving and fraudulently intending to hinder, and as much as in him lay, to deprive the said William of the use of his said way, with carts and carriages on the said 10th day of May, in the sixth year aforesaid, spoiled the said Thomas and damnified the same way, in the said place, spoiled the

An action upon the case for disturbance of the plaintiff in the use of a way.
Lut. 112.

The plaintiff seised in fee of a close of land called L. and of a close of meadow called G. and then prescribes for a way.

That the defendant with his carts and carriages

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saïd way, so place, called *Badfley-well lane*, in such a manner with carts that the saïd and carriages (*that is to say*) with the wheels of the same, that the way was of saïd way became of no use to the saïd *William Langhton*, to the no use to damage of the saïd *William Langhton* 20*l.* and therefore he brings the plain- this suit, *and so forth.*
tiff.

Bar.

And the saïd *Thomas* by *Robert Vesey* his attorney, comes and defends the force, injury and damages, and whatever else he ought to defend, when and where the court will take the same into their consideration; and saith, that the saïd *William* ought not to have his saïd action against him, *by protestation saying* that the saïd declaration, and the matters therein contained are insufficient in law for him the saïd *William*, to support his saïd action against the saïd *Thomas*, for plea the saïd *Thomas* saith that one *William Vesey* gentleman, on the saïd 10th day of *May*, in the saïd sixth year, was, and long before had, and *continually ever since hath been, and now is seised of and in a close of land, called *Badfley-well close*, with out of mind its appurtenances, in the saïd parish of *Tickhill*, in his demesne as had a way-- of fee; and that the saïd *William Vesey*, and all those whose estate from the he hath, were used and accustomed to have, and had a certain way, common a foot as well as a horse-way, and for his carts and carriages from the saïd common highway in *Tickhill* aforesaid, above specified in the saïd declaration, in, by and through the saïd place, called *Badfley-well lane*, and from thence, to, by and through the saïd close, called *Badfley-well close*, and so back again from the saïd close, called *Badfley-well close*, through the saïd common highway at *Tickhill* aforesaid, every year, at all times in the year, whenever it pleased him so to do; by which means the saïd *Thomas*, as servant to, and by the command of the saïd *William Vesey*, on the saïd 10th day of *May*, in the saïd sixth year, in order to make use of his saïd way, with carts and carriages of the saïd *William Vesey*, did go and pass from the saïd highway, in, by and through the saïd place, called *Badfley-well lane*, and from thence to, by and through the saïd close, called *Badfley-well close*, and from thence returned back again, as it was lawful for him so to do; and so in going, passing and returning, in, by and through the saïd way, he the saïd *Thomas* did break up the soil of the saïd way, in the saïd close called *Badfley well lune*, with the wheels of the saïd carts and carriages, doing as little damage as it was possible for him to do, in making use of the saïd way: which saïd spoiling and damnifying the saïd way, in the saïd place, called *Badfley-well lane*, is the same spoiling and damnifying of the same, whereof the saïd *William* hath above declared against him; and this he is ready to verify; wherefore he prays judgment if the saïd *William Langhton* ought to have his saïd action against him the saïd *Thomas*, *and so forth.*

That one
W. V. was
seised in fee,
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that the saïd
W. V. time
out of mind
had a way--
of fee;
from the
common
way in the
declaration
by and thro
the saïd
place, cal-
led B. lane,
and from
that to and
in the saïd
close, called
B. close,
and there
justifies as
servant to
Vesey, and
with the
saïd Vesey's
carts, &c.

Replication
confessing

And the saïd *William Langhton* saith, that notwithstanding any thing above alledged by the saïd *Thomas*, he the saïd *William* ought not

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not to be precluded from having his said action against him the said *Thomas*; because the said *William* saith, that right and true it is, that the said *William Vesey*, gentleman, in the said sixth year was, and long before had, and ever since hath been seised of and in the said close of land, called *Badfley-well close*, with its appurtenances, in the said parish of *Tickhill*, in his demesne as of fee; and that the said *William Vesey*, and all those whose estate he hath, and during all that time had of and in his said close, with its appurtenances, time out of mind used, and were accustomed to have, and had a certain way, as well a foot as a horse way, and for his carts and carriages from the said common highway in *Tickhill* aforesaid mentioned in the said declaration, in, by and through the said place, called *Badfley-well lane*, and from thence to, in, by and through the close of the said *William Vesey*, called *Badfley-well close*, and so back again from the said close, called *Badfley-well close*, through the said way, to the said common highway in *Tickhill* aforesaid, every year, at all times in the year, at his pleasure, as the said *Thomas* above in pleading hath alledged. But the said *William Langhton* further saith, that the said *Thomas*, in making use of the said way,* unjustly, and contrary to the form of the said pre-
P *132
 scription, went and passed through with his carts and carriages from the said common highway, in, by and through the said place, called *Badfley-well lane*, and from thence to and in the said close, called *Badfley-well close*, and further than the said close, called *Badfley-well close*, into another close of the said *William Vesey*, called *Wharton Longdals*, and so back, again from the said close, called *Wharton Longdals*, to the said close, called *Badfley-well close*, and so to the said highway described in manner aforesaid; and in going to the said close, called *Wharton Longdals*, and from thence returning with his carts and carriages in the manner, and by the way aforesaid, he so spoiled and dammified the same way, in the said place, called *Badfley-well lane*, with the wheels of his said carts and carriages, that the said way became of no manner of use to the said *William Langhton*; and this he is ready to verify. Wherefore he prays judgment, and his damages to be awarded to him, by reason of the premisses, and so forth.

And the said *Thomas*, in as much as the said *William Langhton* hath above acknowledged, that the said *William Vesey*, and all those whose estate he hath, and as aforesaid had of, and in the said close, called *Badfley-well close*, with its appurtenances, time out of mind, have used, and been accustomed to enjoy the said way, leading between the said common highway, and the said close, by and through the said place called *Badfley-well lane*, every year, at all times in the year at his will, as the said *Thomas* hath above alledged; so that it is plain, that the said way, by and through the said place, called *Badfley-well lane*, is not appurtenant only to the said tenements of the said *William Langhton*, as he above supposes: And

that Vesey had such a way.

But further the plaintiff saith, that the defendant went further than the close of Vesey, called B. close, to another close called W. L.

Rejoinder. In which no new matter is alledged, but the defendant only relies upon the matter before pleaded.

in

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The case. in as much as it was, and is lawful for the said *William Vesey* to go into the said close, called *Badfley-well close*, and from thence into the said other close, called *Wharton Langdals*, and to return back again from thence into the said close, called *Badfley-well close*; and this without doing any damage to any person whatsoever, as before, he prays judgment, whether the said *William Langhton* ought to have his said action against him the said *Thomas*, and so forth.

To this there was a demurrer, and a joinder in demurrer.

Resolved by the whole court, that the defendant having laid his prescription only to the close, called *Badfley-well close*, could not justify to go further in the other close of *William Vesey*, called *Wharton Longdals*, according to 1 *Roll's Abr.* 91. letter R. *Sanders* and *Mose's case*, and 1 *Mod.* 190. *Howel* and *King's case*.

Observe that the declaration is, that the defendant had spoiled the way with his carts and carriages; and the defendant justifies with the carts and carriages of *William Vesey*. *Qu.* of this; for the reporter says it seems to him to be material.

P *133 **Pleas before our Sovereign Lord the King at Westminster, of Hillary Term in the ninth year of the reign of our Sovereign Lord William the third, King of England, and so forth. Roll 437.*

IVESON against MOORE.

2 Salk. 728 *Yorkshire*. Be it remembered that heretofore, (*that is to say*) in Com. 58. the term of St. Michael last past, *Henry Iveson* came before our sovereign Lord the King at Westminster. by *Edmund Barker* his attorney, and then brought there into the court of our said sovereign Lord the King, a certain bill against *John Moore*, Esq. and *Ruth* his wife, *Samuel Bright*, *Jeremiah Lebley*, *Henry Smith*, and *Peter Blakey*, being in the custody of the marshal, and so forth, of a plea of trespass on the case; and there are pledges of prosecuting, (*that is to say*) *John Doe*, and *Richard Roe*; which said bill follows in these words, (*that is to say*) *Yorkshire* ss. *Henry Iveson* complains of *John Moore*, Esq. and *Ruth* his wife, *Samuel Bright*, *Jeremiah Lebley*, *Henry Smith*, and *Peter Blakey*, being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, for that whereas the said *Henry Iveson*, on the 14th day of May, in the ninth year of the reign of our said sovereign Lord *William the third*, was, and long before had, and ever since hath been,

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been, and now is possessed of a certain term of years then to come, and yet unexpired, of and in a certain colliery, or mine of coals, being under the soil and earth, and in the intestine parts of a certain close or parcel of land, lying and being in the parish of *Whit-kirk* alias *Whitchurch*, in the county aforesaid, commonly called *Whit-kirk*, otherwise *Whitchurch Fields*, and next adjoining to a common highway in the parish aforesaid, on the north side, leading from the town of *Wetherby* in the said county, in, by and through a certain moor called *Win-moor*, and from thence in, by and through a certain lane, called *Anliffaw-lane*, and from thence in, by and through the village of *Whit-kirk*, otherwise *Whitchurch* aforesaid, and so back again; and of and in a certain mine of coals, being under the soil or earth, and in the intestine parts of a certain close, moor, or parcel of land in the parish aforesaid, called *Halton-moor*, situate, lying and being, and also near adjoining to the said common highway, leading on the north side from the town of *Wetherby* aforesaid, in, by and through the said moor, called *Win-moor*, and from thence in, by and through a lane, called *Anliffaw-lane*, and from thence in, by and through a village called *Halton* in the county aforesaid, and so back again; in by and through which said lane, called *Anliffaw lane*, the coals got and dug out of the said mine, have been used, and were then intended to have been carried and conveyed away from the close aforesaid, to neighbouring and adjacent places, and where they used to be sold: And whereas on the same 14th day of *May*, he the said *H. Iveson* had two hundred load of coals dug out of the said mine, ready to be exposed to sale in the said several closes; the said *J. R. S. J. H. S.* and *P.* not being ignorant of the premises, but contriving and fraudulently and maliciously intending to hinder the said *Henry* from the use and benefit of his said coals, and to alienate and seduce the buyers of coals from buying the same, in order to gain and procure such traders in coals to buy coals of the said *John Moore*, which he had and was possessed of near to the said parish afterwards, (*that is to say*) on the 14th day of *May*, in the ninth year of the reign of his said present Majesty, put and placed four loads of great stones, and the root of a beechen tree in the way, in the said lane, in the parish aforesaid: And the same stones, and the root of a beechen tree, as aforesaid, so put and placed, were by them permitted, and caused to remain there for the space of a month; by reason of which stones, and the root of a beechen tree so lying and being there, the said way in and through the said lane was so blocked up and obstructed, that the carts and carriages for carrying the said coals, got and dug from the colliery or mine aforesaid, could not pass in, by and through the said way, in the lane aforesaid; by which the said *Henry*, during the time aforesaid, lost all benefit, profit and advantage of his said coals; and the coals got and dug out of the said colliery, by reason of their being so obstructed

was joining to the highway leading through a lane, called *Anliffaw Lane*,

through which lane coals used to be carried,

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That the defendant intending to injure the plt. blocked up the lane with stones of trees.

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from being carried away, were greatly damnified, and brought at length to be of little or no value, to the damage of the said *Henry* fifty pounds; and therefore he brings his suit, *and so forth.*

BARBER against Fox.

1 L. Raym. *Yorkshire.* *Stephen Barber* complains of *Humphrey Fox*, being in the
111. custody of the marshal of the *Marshalsea*, of our sovereign Lord,
2 Saund. the King before the King himself; for that whereas one *Anthony*
134. 1 Vent. *Fox*, father to the said *Humphrey*, late of *Thorpe*, in the parish of
189. 2 Keb. *Hathersidge*, in the county of *Derby*, in his life-time, (*that is to say*)
811. 1 Sid. on the seventeenth day of *February*, in the year of our Lord one
31. 248. thousand six hundred and fifty four, by his certain bond, sealed
1 Lev. 165. with the seal of the said *Anthony*, bearing date the same day and
1 Keb. 890. year, acknowledged himself to be held, and firmly bound to the
1 Roll's said *Stephen* in the sum of ninety two pounds, twelve shillings, of
Abr. 128. lawful money of *England*, with a condition thereto subscribed;
Co. Lit. That if the said *Anthony*, his heirs, executors, or administrators, or
209 Palm. either of them, should pay to the said *Stephen*, the full and just
171. Farsley sum of fifty one pounds, and sixteen shillings, of like lawful money
13. 1 Salk. of *England*, at or upon the eighteenth day of *February*, which should
23. 25. be in the year of our Lord one thousand six hundred and fifty six,
Hob. 4. 5. at or within the then dwelling house of the said *Stephen Barber*,
1 Sid. 67. situate in *Uxhill* in the said county of *York*, without fraud or fur-
Mod. 845. ther delay, then the said bond should be void, and of none effect,
3 Cro. 126. otherwise would be and remain in full force and virtue; which
1 Leon. 114. said fifty one pounds sixteen shillings, the said *Anthony* in his life
1 Saund 49. time, or the said *Humphrey* after his decease, (which said *Humphrey*
1 Leon. 67, is son and heir to the said *Anthony*) have not, nor either of them hath
68. paid to the said *Stephen*, upon the said 18th day of *February*, 1656,
4 Leon. 6. at the said dwelling house of the said *Stephen*, according to the form
1 Sid. 337, and effect of the said condition, by which the said bond became
242. Ray. forfeited. And afterwards (*that is to say*) on the first day of
32. Hard. *January*, in the 20th year of the reign of his said present Majesty,
73. 1 Lev. he the said *Stephen* intended to plead and prosecute the said *Hum-*
222. *phrey*, as son * and heir to the said *Anthony* his father, upon the said
2 Roll's bond forfeited in manner as above; of which said intention, the
Rep. 435. said *Humphrey* having notice, he the said *Humphrey*, the day and
A declara- year last above mentioned, at *Rotheram*, in the said county, in con-
tion upon a sideration that the said *Stephen*, then and there, at the special in-
promise in stance and request of the said *Humphrey*, would from thence
P * 135 forbear to prosecute his said suit upon the said bond against him the
considera- said
the plt said
would not said
sue for a said
debt. said

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said *Humphrey*, as son and heir to him the said *Anthony*, the said *Humphrey* then and there undertook, and faithfully promised the said *Stephen*, that he the said *Humphrey* would well and truly content and pay to the said *Stephen*, the said fifty one pounds sixteen shillings, when ever he should be thereto required. And the said *Stephen* in fact saith, that he trusting to the promise and undertaking of the said *Humphrey*, did from thence forbear his said suit, intended to be prosecuted by him the said *Stephen*, against the said *Humphrey*, as son and heir of the said *Anthony* his father, upon the said bond. Nevertheless the said *Humphrey*, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtilly to deceive and defraud the said *Stephen* in this particular, hath not yet paid to the said *Stephen*, the said sixty one pounds sixteen shillings, according to his said promise and undertaking, nor in any wise made him satisfaction for the same, although the said *Humphrey* afterward, (*that is to say*) on the 10th day of *February*, in the said twenty second year of his said present Majesty, was by the said *Stephen* thereto requested, but hath altogether hitherto, and still doth refuse to pay or satisfy him for the same, to the damage of the said *Stephen* 100l. and therefore he brings this suit.

After a verdict, it was moved in an arrest of judgment that here was no consideration; for it did not appear that the defendant was suable upon that bond, as son and heir; for he ought to have shewn, that the ancestor did bind himself and his heirs. And if the heir is not expressly bound by name, he is not bound at all; and to warrant this resolution, the following cases are in the books. *Pal.* 160. 1 *Sid.* 31, 67. *Moor* 845. *Hob.* 4. 5. 3 *Cro.* 126. 1 *Leon.* 114. 1 *Sand.* 49. 3 *Leo.* 67. 4 *Leo.* 6. 1 *Vent.* 189. 1 *Sid.* 337. 242. *Ray.* 32. *Hard.* 73. 1 *Lev.* 222.

Cheshire. *Henry Moor* clerk, doctor of laws, rector of the moiety of the parish church of *Malpas* in the county of *Chester*, complains of *John Plumley*, executor of the last will and testament of *Thomas Sands* clerk, late rector of the said moiety of the said parish church, in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself; for that whereas according to the laws and customs of this Kingdom of *Great Britain*, hitherto used and approved of, all and all manner of prebendaries, rectors and vicars, within this kingdom of *Great Britain*, for the time being, have been obliged, and of right ought to repair and uphold all and every of their houses, prebend, rectories and vicarages, and leave them so repaired and upheld to their successors; and if such prebendaries, rectors and vicars, should not leave them so repaired and upheld, as aforesaid, to their successors, but leave them unrepaired, and with dilapidations, the executors of such * prebendaries, rectors and vicars after their decease, have always been obliged, and of right ought to pay and satisfy, out of the goods and

The resolution of the case upon this entry.

ons by the rector against the executor of his predecessor.

Lilly 68.

Actions on the Case.

and chattels of their testators, to the succession of such prebendaries, rectors and vicars respectively, all such sums of money as are sufficient to be expended and laid out for the necessary repairing and rebuilding of such houses or buildings. And whereas the said *Thomas Sands*, late rector, as aforesaid, of the said moiety of the said parish church, in right of his rectory, was seised of and in a dwelling house, with its appurtenances in *Malpas* aforesaid, in the said county of *Chester*, and of and in the north side of the chancel of the said church, the said *Thomas Sands*, rector, as aforesaid, of the said moiety of the church, in manner aforesaid, on the twelfth day of *August*, in the twelfth year of the reign of our sovereign lady *Anne* Queen of *Great Britain*, and so forth, died at *Malpas* aforesaid: And the said *Henry Moor* afterwards, (*that is to say*) on the fifteenth day of *December*, then next following, was presented, and admitted, instituted and inducted, into the said moiety of the said parish church, vacant by the death of the said *Thomas Sands*, and became, and now is rector of the same. And the said *Henry* in fact saith, that at the time of the death of the said *Thomas Sands*, the said dwelling house, with its appurtenances, and the said north side of the said church, were out of repair, and with dilapidations; and that such sums of money as were laid out and expended about the necessary repairing the said premises, amounted to the sum of sixty nine pounds seven shillings of lawful money of *Great Britain*. Nevertheless the said *John Plumley*, after the decease of the said *Thomas*, although often requested, hath not paid or satisfied to the said *Henry* the said sum of money, or any part thereof, for the necessary repairs of the said premises so as aforesaid out of repair, and with dilapidations, but altogether hath, and still doth refuse to pay, or satisfy him for the same, to the damage of the said *Henry* one hundred pounds; and therefore he brings this suit, and so forth.

BENSON against WELBY, the late Sheriff of Lincoln.

Trinity, the Twenty-first of *Charles* the Second. Roll 1505.

Vide Parker *Yorkshire*. Be it remembered, that heretofore in *Easter* term v. Welby last past, came before our sovereign lord the King at *Westminster*, S. C. 1 Sid. *Christopher Benson*, by *John Stone* his attorney, and then produced 439. 1 Ven. there in court before our said sovereign Lord the King, his certain 85. 1 Mod. bill against *William Welby*, Esq. late sheriff of *Lincoln*, in custody of 57. 2 Keb. the marshal, and so forth, of a plea of trespass upon the case. And 591, 626, there are pledges for the prosecution, (*that is to say*) *John Doe* and 630, 657, *Richard* 670.

Actions on the Case,

Richard Roe, which said bill follows in these words, (*that is to say*) ^{2 Saund.}
Yorkshire. Christopher Benson complains of *William Welby*, Esq. ^{150.} An
late sheriff of *Lincoln*, in custody of the marshal of the *Marshalsea* action up-
of our said sovereign Lord the King, before the King himself; for on the case
that whereas one *John Wright*, heretofore, (*that is to say*) on the brought by
first day of *August* 1677, at the city of *York* in the said county, by plaintiff
his bill obligatory, sealed with his seal, bearing date the same day the then
and year, acknowledged himself to owe and be indebted to the late sheriff
said *Christopher*, in the just sum of 166l. of lawful money of En- P * 137
gland, which he undertook, and promised to pay to the said *Christo* of *Lincoln*,
pher, at or upon the second day of *February*, next following the for an es-
date of the said bill, and thereby he obliged himself, his heirs, cape upon
executors and administrators, in the sum of 332l. of like money, mesne pro-
firmly by the same bill, to the due payment of the said 166l. which cess, and
said 166l. at and upon the said second day of *February*, the said falsely re-
John did not pay to the said *Christopher*, according to the form turning,
and effect of the said bill; by virtue of which said bill, the said that he had
332l. became forfeited to the said *Christopher*: And whereas also taken him,
the said *John*, being indebted to the said *Christopher* in the said sum and had his
of 332l. he the said *Christopher* afterwards, (*that is to say*) in J. W. was body ready,
Trinity term, in the 20th year of the reign of our sovereign Lord indebted to the plaintiff
King *Charles* the second, now King of *England*, (*and so forth*,) for by bond.
the recovery of the said 332l. prosecuted out of his said Majesty's The plain-
court, held before the King himself at *Westminster*, commonly called tiff sued out
the king's bench, in the county of *Middlesex*, a certain writ of our a writ for
said sovereign Lord the King, against the said *John*, directed to the the recovery
said sheriff of *Lincoln*, by which said writ, his said Majesty com- of his
manded the said sheriff of *Lincoln*, that he should have taken the said debt,
said *John*, if he could have been found in his bailiwick, and have directed to
safely kept him, so that he had his body before his said Majesty at the sheriff
Westminster, on *Friday* next after three weeks from the feast of St. of *Lincoln*.
Michael then next following, to answer to the said *Christopher* in a The tenor
plea of trespass, and also to a bill of the said *Christopher* exhibited of the writ.
against him the said *John*, according to the custom of the court of
our said sovereign Lord the King, before the King himself, for the
said debt of 332l. and that the said sheriff should have there
at the same time that writ, which said writ the said *Christopher*
afterwards, and before the return of the said writ, (*that is to say*)
on the last day of *August* in the 20th year abovesaid, at the castle
of *Lincoln* in the said county of *Lincoln*, was delivered to the said
William, then sheriff of the said county of *Lincoln*, to be executed
in due form of law, and with an intention, that the said sheriff, by
virtue thereof, should take and arrest, and at the day of the return
thereof have the said *John* in the said court of our said sovereign
Lord the King, before the King himself, there to be committed to
the custody of the marshal of the *Marshalsea*, of our said sovereign
Lord the King, before the King himself, according to the custom of
the

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the said court, time out of mind used and approved of, or otherwise should put in sufficient bail in the same court of our said sovereign Lord the King, before the King himself, according to the custom of the said court, for the whole time abovesaid, used and approved of, to answer to the said *Christopher* of a plea, and bill abovesaid. And the said *Christopher* in fact says, that after the delivery of the said writ in form abovesaid, and before the day of the return thereof, (*that is to say*) on the 20th day of *October*, in the said 20th year at the castle of *Lincoln* abovesaid, the said *William* then being sheriff, as abovesaid, of the said county of *Lincoln*, by virtue of the said writ, at the suit of the said *Christopher*, took and arrested the said *John*, and then and there had him under the custody of him the said sheriff, by virtue of the said writ; and the said *John* being so in his custody, was brought to *Rippon* in the county of *York*: Nevertheless the said *William* being then sheriff of the said county of *Lincoln*, * maliciously intending totally to deprive the said *Christopher* of the said 332l. and of his remedy for the recovery thereof; afterwards (*that is to say*) on the said 20th day of *October*, in the said 20th year at *Rippon* abovesaid, the said *John* so being in the custody of the said *William*, then sheriff of the said county of *Lincoln*, suffered him to escape, and go at large whither he would; the said *Christopher* not having had any satisfaction for the said 332l. or any part thereof; and on the said Friday next after three weeks of *St. Michael*, before our said sovereign Lord the King at *Westminster*, falsely returned, that he had taken the body of the said *John*, which said body he had ready to be before his said Majesty, at the day and place contained in the said writ, as by the said writ he had been commanded. Whereas in truth, the said *William*, then sheriff of the said county of *Lincoln*, had not the body of the said *John* before his said Majesty, at the day and place in the said writ contained, by which the said *Christopher* is totally defrauded of the said 332l. and of the proper remedy of recovering the same. Wherefore the said *Christopher* says, he is thereby injured and endamaged, to the value of 400l. wherefore he brings this suit, *and so forth*.

This was held in 2 *Saund.* 154. to be a good declaration, but it was doubted whether it was properly a declaration for a false return, or for an escape.

A. B. late of *Queenhithe* *London*, meal-factor, was attached to answer *J. M.* in a plea of trespass upon the case, (*and so forth*); and whereupon the said *A. B.* by *John Cock* his attorney complains, that whereas one *R. B.* on the first day of *October*, in the fifth year of the reign of our sovereign Lord *George* the second, now King of *Great Britain*, *and so forth*, at *London* abovesaid, in the parish of *St. Mary Bow*, in the ward of *Cheap*, was indebted to the said *J. M.* in the sum of fifty pounds of lawful money of *Great Britain*, for divers wares and merchandizes, sold and delivered by the said *J.*

M. to

The the
defendant
arrested the
said Wright,
and permit-
ted him to
escape.

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And re-
turned
falsly that
he had him
ready, &c.

1 Mod. 33,
57, 240.

244. 1 Syd.
430.

1 Vent. 55,
85. 2 Keb.

591, 626,
630, 657,
670.

1 Danv.
181.

2 Sand. 59,
60.

An action
brought
against the
defendant
for rescuing
one that
was arrest-
ed at the
plaintiff's
suit,

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M. to the said *A. B.* before that time, at his instance and request. And whereas the said *A. B.* in *Michaelmas* term, in the fifth year of the reign of our said sovereign Lord the King at *London* aforesaid, in the said parish and ward, prosecuted out of his said Majesty's court, held before the King himself, his said Majesty's writ of *Latitat* against the said *A. B.* directed to the then sheriffs of *London*, returnable before our said sovereign Lord the King, on *Saturday* next after the octave of *St. Hill.* then next following, with an intent that afterwards, and before the return of the said writ, by virtue of the same, the said sheriffs of *London* should have arrested the said *A. B.* and him so arrested have conducted into the said court; that the said *A. B.* might by the said court, be delivered upon bail, or otherwise have been committed to the custody of the marshal of this court; that the same *J. M.* might have exhibited his bill of debt against the said *A. B.* for the said fifty pounds, at the said *Saturday* next after the said octave of *St. Hill.* by virtue of which said writ, *Samuel Russell*, Esq. and *Thomas Pinder*, Esq. then and now sheriffs of *London* aforesaid, at *London* aforesaid, in the said parish and ward, afterwards, and before the return of the said writ, (*that is to say*) on the 10th day of *December*, in the said fifth year by their warrant in writing directed to their serjeants at mace, there by commanding them, or* any of them, that they should take P the said *R. B.* so as the said sheriffs of *London* might have his body before the said Lord the King, on the said *Saturday* next after the said octave of *St. Hill.* to answer to the said *J. M.* in the said plea of trespass upon the case, according to the form and effect of the said writ; by virtue of which warrant, *Ch. Hobson*, one of the serjeants at mace to the said sheriffs, afterwards, and before the return of the said writ, (*to wit*) on the said 10th day of *December* in the year aforesaid, took and arrested the body of the said *R. B.* and him so arrested, then and there had in his custody, and the said *A.* knowing the said *R.* to be arrested by the said sheriffs of *London*, for the cause aforesaid, craftily and fraudulently contriving and intending to deceive and defraud the said *J. M.* of the said fifty pounds, the said *A.* afterwards (*that is to say*) on the same 10th day of *December* in the said year in *London* aforesaid, in the said parish and ward, with force and arms, made an assault upon the said *Ch. Hobson*, and took, and rescued the said *R. B.* out of the custody of the said *Ch. Hobson*, and conveyed him away to places altogether unknown to the said *Ch. Hobson*,; by which the said *J. M.* not only sustained, expended and underwent divers labours, journies and expences, in complaining against, and prosecuting the said *R.* in order to have a satisfaction for his said debt; but also the said *J. M.* totally lost his said debt, by reason of the said rescue committed and done by the said *A. B.* and conveying the said *R. B.* to places unknown to the said *Ch. Hobson*, as above, to the damage of the said *J. M.* one hundred pounds, and therefore the said *J. M.* brings his suit, and so forth.

An

ACTIONS on the Case.

An Issue out of Chancery.

COLLINS against FORD.

Lilly 66.
A declaration in order to try a feigned issue whether the defendant had received 128l. 10s. out of the said partnership.

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London. *Thomas Collins* complains of *John Ford*, in the custody of the marshal of the *Marshalsea*, of our sovereign Lord the King, before the King himself; for that whereas on the first day of *May*, in the fifth year of the reign of his present Majesty *George* the second, King of *Great Britain*, and so forth, at *London* aforesaid, (*that is to say*) in the parish of *St. Mary Bow*, in the ward of *Cheap*, a certain discourse arose, and was had between the said *Thomas* and *John*, of and concerning the partnership, or the joint trade of a bookfeller, that had been carried on between the said *Thomas* and the said *John*, and of and concerning certain exceptions that had been taken in a certain suit or complaint, before that time levied and prosecuted in the high court of chancery, between the said *Thomas* and the said *John*, and of and concerning divers sums of money in the whole amounting to one hundred and twenty eight pounds ten shillings of lawful money of this Kingdom of *Great Britain*, in the third of the said exceptions mentioned; upon which discourse, so as aforesaid had and risen, there was then and there a dispute between the said *Thomas* and the said *John*, whether the said sum of one hundred and twenty eight pounds ten shillings, or any part thereof, had been received by the said *John* to his own use, out of the partnership stock, or no; and thereupon the said *John* afterwards, (*that is to say*) the same day and year at *London* aforesaid, in the said parish and ward, in consideration, that the said *Thomas*, at the special instance and request of the said *John*, then and there had paid to the said *John* five shillings of lawful money of *Great Britain*, undertook, and then and there faithfully promised the said *Thomas*, that he the said *John* would pay to the said *Thomas* forty shillings of like lawful money, if the said sum of one hundred twenty eight pounds ten shilling, or any part thereof, had been taken and received by the said *John* to his own use, out of and from the partnership stock. And the said *Thomas* in fact saith, that the said sum of one hundred twenty eight pounds and ten shillings, was taken by the said *John* to his own use out of the partnership stock. Nevertheless the said *John*, not regarding his promise and undertaking made as above, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *Thomas* in this particular, hath not paid to the said *Thomas* the

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the said forty shillings, nor any ways given him satisfaction for the same, although the said *John*, afterwards, (*that is to say*) the second day of *May*, in the fifth year aforesaid, at *London* aforesaid, in the said parish and ward, was requested thereto by the said *Thomas*. But the said *John* hath altogether hitherto refused to pay to the said *Thomas* the said forty shillings, or to make him any satisfaction for the same, whereby the said *Thomas* saith he is injured and endamaged to the value of five pounds; and therefore he brings this suit, *and so forth*.

A. B. complains of *C. D.* being in the custody of the marshal of the *marshalsea*, of our sovereign Lord the King, before the King himself; for that whereas the said *C. such a day, year and place*, had covenanted and bargained with the said *A.* to make and burn for him the said *A.* in a workman-like manner, eighty thousand bricks, for a certain sum of money, (*that is to say*) for twenty pounds in hand paid, and the rest to be paid when the said bricks should be so made and burnt; and the said *C.* then and there promised and undertook to make and burn the said eighty thousand bricks in a good and work-like manner, and to cause the same to be delivered to the said *A.* on or before (*such a day, at such a place*) yet the said *C.* not regarding his said promise and undertaking, but contriving craftily and subtilly to deceive and defraud the said *A.* so negligently and improvidently made and burnt sixty thousand of the said bricks, and on (*such a day, at such a place*) caused the same to be delivered to the said *A.* in so bad and unworkman-like manner, that the said sixty thousand bricks, for want of due making and burning of the same, could in no manner be serviceable to the said *A.* for the work and business they were to be employed about; by which the said business and work of the said *A.* is much damaged; whereupon he saith, that he is thereby injured and endamaged to the value of forty pounds; and thereupon he brings this suit, *and so forth*.

Norfolk. A. B. of *T.* in the said county, was attached to answer to *C. D.* of a plea wherefore the said *A.* with force and arms at *T.* aforesaid, took away and rode a certain gelding of the said *C.* there found in such a manner, that the said gelding, by means of such riding * thereof, was much damaged, and committed other injuries against the said *C.* to his great damage, and against the peace of our sovereign Lord the King that now is; and whereupon the said *C.* by *J. C.* his attorney complains, that the said *A.* on the twenty-third day of *December*, in the tenth year of the reign of his said present Majesty, with force and arms, took and rode away a gelding of the said *C.* in such a manner at *Thetford*, in the said county, that the said gelding, by means of the said *A.*'s taking and riding the same, was much damaged, and committed other injuries against the said *C.* to his great damage, and against the peace of our said sovereign Lord the King; and whereupon the said *C.* saith, that he

Declaration
in case by
way of de-
ceit in a
bargain.

For taking
away a gel-
ding of the
plaintiff.

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is injured and endamaged to the value of ten pounds; and therefore he brings this suit, *and so forth.*

A declaration for selling a gelding to the plaintiff, knowing it to be the property of another.

Suffolk. *A. B.* late of *St. Edmond's Bury*, in the said County of *Suffolk*, apothecary, was attached to answer *C. D.* of a plea of trespass on the case; and whereupon the said *C.* by *Thomas Evans* his attorney complains, that whereas (*such a day and year*) at *St. Edmond's Bury* aforesaid, a certain discourse arose between the said *C.* and the said *A.* about a certain gelding he bought of the said *A.* which the said *A.* affirmed to the said *C.* was the property of him the said *A.* by reason of which affirmation the said *C.* was induced to, and did then and there buy the said gelding of the said *A.* for ten pounds, and then and there paid the said *C.* the said ten pounds for the same. And the said *C.* in fact says, that the said gelding, at the time of the said affirmation, and the said *C.*'s buying the same, was not the proper gelding of the said *A.* but the said gelding at the time of such affirmation and sale thereof to the said *C.* was the proper gelding of one *D.* and of right did belong and appertain to the said *D.* And he the said *D.* afterwards (*that is to say*) (*such a day and year*) at *St. Edmond's Bury* aforesaid, took and led away the said gelding out of and from the hands and possession of him the said *C.* as the proper gelding of the said *D.* whereby the said *C.* says he is injured, not only by having the said gelding taken from him by the said *D.* as his own property, but also he the said *C.* was obliged and constrained to pay, and expend divers sums of money, in the whole amounting to twelve pounds for the redemption of the said gelding, to the damage of the said *C.* twenty pounds; and therefore he brings this suit, *and so forth.*

An action upon the case for diverting a water-course.

Southampton. — *John Hubbard*, late of *Owington*, in the county aforesaid, labourer, *Jonathan Bignell*, late of the same, labourer, were attached to answer to *Anne Yalden*, of a plea of trespass on the case; and whereupon the same *Anne* on the first day of *January*, in the first year of the reign of our sovereign lord the now King, and for three years then last past, was, and now is lawfully possessed of, and in an ancient messuage, and five acres of meadow called the upper meadow, with the appurtenances in *Lewington*, in the parish of *Caston*, in the county aforesaid, which said meadow lieth on the east-side of the messuage aforesaid; on the north-side contiguously adjoining to a certain ancient water course, called *Owington* water-course, which now runs, and time out of mind* hath runned, and used, and of right ought to run from a certain river called *Itchin* river, in the parish of *Itchin Stooke*, in the county aforesaid, to *Owington* aforesaid, in the county aforesaid; and from *Owington* aforesaid, to, in, by and through the said meadow, called the upper meadow, and from thence quite up to, by, thro' and beyond the said messuage, into a certain rivulet in *Lewington* aforesaid, in the said county, called *Lewington* river. Notwithstanding which, the said *John* and *Jonathan*, not being ignorant

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ignorant of the premises, but contriving, and maliciously intending totally to frustrate and hinder the same *Anne*, from the use and benefit of the water course aforesaid, on the 18th day of *March*, in the year 1718, at *Owington* aforesaid, in the county aforesaid, dug, broke up, and cast a certain bank, on the north-side of the said water course, and thereby diverted the said water course, from the water course of the said *Anne*; by which the said *Anne* was totally deprived of, and lost the whole use, profit and benefit of the said water course for a long time, (*that is to say*) from thence until the 18th day of *April* next following, to the damage of the said *Anne* 20*l.* and therefore she brought this suit, and so forth.

MINGAY against KNIGHTON.

Trinity Term, the Sixth of King George.

Bucks. ——— *John Mingay* complains of *William Knighton* Upon an and *Edward Smith*, in the custody of the marthal, and so forth, agreement for this cause, (*that is to say*) whereas the said *John*, on the 20th day of *April*, in the year of our Lord 1720, at *Aylesbury*, in the lessor and lessee, about laying down of land and dressing it in a husband like manner. now in the possession of the said *William* and *Edward*, at and under the yearly rent of twenty-three pounds, for a term of six years, beginning, in, and upon the feast of the Annunciation of the Blessed Virgin *Mary*, then last past. And the said *John*, at the like instance and request of the said *William* and *Edward*, then, and there agreed, that the said *William* and *Edward* should have, and take four crops of grain, during the four years then next following the said 20th day of *April* 1720, at *Aylesbury*, in the county aforesaid, the said *William* and *Edward*, in consideration thereof, undertook, and then and there faithfully promised the said *John*, that they the said *William* and *Edward*, at the end of the fourth year, would lay down the same in a husband like manner, and would sow upon every acre of fenn or marsh lands, nine pounds of clover grafs seed. And although the said *John* hath performed, and fulfilled all and every thing on his part to be performed and fulfilled, nevertheless the said *William* and *Edward* not regarding their promise and undertaking aforesaid, but contriving, and fraudulently intending to do damage to the said twenty-three acres of marsh land, and to render the same of no value, at the end of the said four years, the said *William* and *Edward*, did not lay down the said twenty-three acres of fenn or marsh land, according to a husband like manner, nor have sowed the same, or any part thereof

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P *143 with the seed, *called clover-feed, but after the end of the said four years, (*that is to say*) on the fifth year next after the said agreement, tilled and plowed the said twenty-three acres of fenn or marsh land, contrary to the form and effect of their said undertaking; wherefore the said *John* saith that he is injured, and sustains damage to the value of forty pounds; and therefore brought this suit, *and so forth*.

This declaration was drawn by *Sergeant Branthwayte*.

For stop-
ping up the
plaintiff's
lights.

Suffolk. ——— *J. M.* complains of *S. B.* in the custody of the marshal of the *marshalsea*, *and so forth*, for that whereas the same *J.* on the twenty-first day of *March*, in the year of our Lord 1730, was, and always afterwards hitherto hath been, and yet is possessed of and in an ancient messuage, with the appurtenances, situate, lying and being in the parish of *St. Edmond's Bury*, in the county of *Suffolk*, in which said messuage the same twenty-first day of *March*, in the aforesaid year, time out of mind, there had been and then were four ancient windows on the north-side of the said messuage, by, and through which four windows, the wholesome air, and comfortable light, on the same twenty-first day of *March*, in the year aforesaid, did enter, and was brought in, and during the whole time aforesaid, had entered and used to be brought in, to the great benefit and advantage of the inhabitants of the said messuage. And whereas the said *S.* on the said twenty-first day of *March*, in the aforesaid year was, and always afterwards hitherto hath been, and now is possessed of a certain parcel of land, with the appurtenances situate, lying and being in *St. Edmond's Bury* aforesaid, in the county aforesaid, next and contiguously adjoining to the same antient messuage of the said *J.* and being so possessed, the said *S.* contriving, and fraudulently intending, in a grievous manner, to trouble the said *J.* and to hinder the air and light from being brought, and entering into the said messuage of the said *J.* which used to enter and be brought in thereto, through the said windows, and thereby procure darknes thereto; on the said twenty first day of *March*, in the said year, at *Bury St. Edmond's* aforesaid, in the county aforesaid, the said *S.* newly built and erected a certain new messuage, upon the said parcel of land of the said *C.* so near the aforesaid antient messuage of the said *J.* and continued the same until the first day of *June* 1730, so that by reason of the said new erection of the said new messuage of him the said *C.* and continuing the same, the windows aforesaid, of the said *J.* on the same twenty-first day of *March*, in the year aforesaid, and always afterwards, to the first day of *June*, in the year of our Lord 1730, were very much overshadowed and darkened, by which the said *J.* from the said twenty-first day of *March*, in the said year of our Lord 1729. to the said first day of *June* 1730. at *Bury St. Edmond's* aforesaid, totally lost, and was deprived of the whole benefit and advantage of the said windows, and of the delight and wholesome-

ness

Actions on the Case.

ness of the said air and light, which were accustomed to enter, and be brought into the said messuage. Wherefore the said J. saith, that he is injured and endamaged to the value of one hundred pounds; and therefore brings this suit, *and so forth.*

Vide 1 Lev. 122, 239. 2 Lev. 194. 1 Mod. 55. 6 Mod. 116, 245, 314. 2 Salk. 459. Ray. 87. 1 Sid. 167. Hob. 131. Poph. 107. 1 Cro. 419. Hut. 136.

**Essex.* C. N. was attached by his Majesty's writ of privilege, to answer to H. D. one of the attornies of his said Majesty's Court of Common Bench, according to the liberties and privileges of the same court, for attornies of the said Common Bench, time out of mind, used and approved of, of a plea of trespass upon the case, *and so forth.* And whereupon the said H. in his proper person complains, that whereas according to the laws and customs of this realm of our sovereign Lord George the Second, King of Great Britain, *and so forth,* the innkeepers that keep common inns to lodge travellers therein, who abide in the same, are bound to keep their goods and chattels, being within those inns, day and night, without diminution or loss, so that no loss or damage might happen to any such traveller or travellers, by reason of the defect of such due care by such innkeepers, or their servants in those inns. And the said H. on the third day of *October*, in the sixth year of the reign of our sovereign Lord the King that now is, at W. in the county aforesaid, being lodged in the inn of the said C. had a certain gelding of the price of twenty pounds within that inn, and delivered the same to the said C. then and there to be safely kept. Nevertheless the said C. knowing the said gelding to be within his inn, the said C. (*the same day, year and place*) did so negligently keep the said gelding, that the said gelding (for want of safe keeping thereof by the said C. and his servants) went forth and wandered from his said inn; whereby the said H. not only lost the use and profit of his said gelding in going on his said journey, in doing necessary and important businesses, but the same thereby remained undone; and the said H. expended and laid out divers sums of money, not only by reason of the want of his said horse; but also the said H. always from the said third day of *October*, in the sixth year aforesaid, lost the use and benefit of his said gelding; and the said C. hath not delivered to the said H. the said gelding, although the said C. on the twentieth day of *October*, in the year aforesaid, at W. aforesaid was thereto required, but hitherto hath, and still doth refuse so to do, or to make him any satisfaction for the same; whereby the said H. saith, that he is injured and endamaged to the value of twenty pounds; and therefore brings this suit, *and so forth.*

P *144

Trespass upon the case against an innkeeper for suffering the horse of his guest to stray from his inn, by default of him.

Actions on the Case.

A declaration against one for negligently keeping his fire, whereby his neighbour's house and goods were burnt.

Norfolk. ——— *A. B.* late of *Thetford*, in the county afore-
 said, was attached to answer to *R. S.* in a plea of trespass upon the
 case; and whereupon the said *R. S.* by *Robert Martin* his attorney
 complains, that whereas according to the laws and customs of this
 kingdom used and approved of, every man is bound to keep his
 fire safely and securely, lest by the defect of due keeping such fire,
 any damage should happen in any manner howsoever to any of his
 neighbours. The said *A.* not being ignorant of the premises,
 but contriving and intending thereby to injure the said *R. S.* the said
A. on the 10th day of *April*, in the fifth year of the reign of our
 sovereign Lord *George* the second, King of *Great Britain*, and so
 forth, being possessed of a messuage or dwelling-house, with the
 appurtenances, *situate at *Thetford* afore said, in the county afore-
 said, and the said *R. S.* being likewise possessed of a messuage
 or dwelling-house, situate and being near the said house of the said
A. B. in *Thetford* afore said, in the county afore said, the said *A. B.*
 so negligently and improvidently kept his fire, in his said messuage
 or dwelling-house, in which he then inhabited and dwelt, that for
 want of due keeping his said fire, part of the messuage or dwelling
 house of the said *R. S.* and his goods, (then and there being) to
 the value of fifty pounds, were then and there destroyed and burnt.
 Wherefore he saith that he is injured and endamaged to the value
 of eight hundred pounds; and therefore he brings this suit, and so
 forth

*Pleas before our Sovereign Lord the King at Westminster, of Easter
 Term, in the seventh year of the reign of our Sovereign Lord William
 the third, now King of England, and so forth. Roll 242.*

SIR JOHN DALSTON against JANSON.

2 Salk. 703. *London.* Be it remembered that heretofore (*that is to say*) in the
Declaration term of *St. Hillary* last past, came Sir *John Dalston*, knight and
 upon the baronet, before our sovereign Lord the King at *Westminster*, by
 custom of *John Pratt* his attorney, and then brought there into his said Ma-
 the realm, jesty's Court his bill against *Joshua Janson*, a common carrier, in
 against a custody of the marshal, and so forth, of a plea of trespass upon
 common carrier, the case, and there are pledges for the prosecution, (*that is to say*)
12 Mod. 73 *John Doe* and *Richard Roe*, which said bill follows in these words,
5 Mod. 90. (*that is to say*) *London.* Sir *John Dalston*, knight and baronet,
Comb. 333. complains of *Joshua Janson* a common carrier, being in the custody
3 Salk. 204 of the marshal of our sovereign Lord the King, before the King
1 Ld. Raym. himself;
58.

Actions on the Case.

himself; for that whereas the said *Joshua* on the sixteenth day of *March*, in the year of our Lord 1693. was, and long before had, and ever since hath been, and now is a common carrier of goods and chattels, and during all that time hath been used to carry for gain and hire, goods and chattels of all persons whatsoever, requiring him hitherto, from *Wakefield* in the county of *York* to *London*, and from thence back again to *Wakefield* aforesaid; And whereas by the laws and customs of this kingdom of *England*, every common carrier, who receives any goods and chattels of any person, for gain, hire and profit to carry the same, is bound to preserve and carry the same, without diminishing or losing any part thereof, so that no damage whatsoever may happen thereto, by the default of such common carrier or his servant; And whereas the said *John* on the 16th day of *March*, in the year of our Lord 1693 at *London* aforesaid, in the parish of *St. Mary Bow*, in the ward of *Cheap*, was possessed of the goods and chattels following, (*that is to say*) of a deal box, and a hundred pieces of gold called guineas, of lawful money of *England*, as of his own proper goods and chattels, and the said *John* being so possessed thereof, on the 16th day of *March* in the same year of our Lord 1693 he the said *John* delivered to the said *Joshua*, at *London* aforesaid, in the said parish and ward, the said box, with the said pieces of coined gold, then therein to carry the same safely and securely from *London** aforesaid, to *Wakefield* aforesaid, in the said county of *York*, and there to be delivered to the said *John*; and the said *Joshua* then and there had and received the said box, with the said pieces of gold, therein to be carried and delivered in the manner as above set forth. Nevertheless the said *Joshua* hath not, at any time afterwards to this very time, delivered the said box, with the said pieces of gold therein to him, the said *John*, as he ought to have done; but instead thereof the said box, and the said hundred pieces of coined gold therein, afterwards, (*that is to say*) on the 17th day of *March*, in the said year of our Lord 1693 were perished and lost at *London* aforesaid, in the said parish and ward, for want of the due care and preservation of the same by him the said *Joshua*, to the damage of the said *John* one hundred fifty pounds; and therefore he brings this suit, and so forth.

And Note, at this day, (*that is to say*) on *Wednesday* next, after fifteen days from the feast of *Easter*, this same term, till which day the said *Joshua* had leave to imparl, and then to make answer to the said bill, came before our sovereign Lord the King at *Westminster*, as well the said Sir *John Dalsion* knight and baronet, by his said attorney, as the said *Joshua* by *William Midgeley* his attorney, and the said *Joshua* defends the said force, injury and damages, and whatever else he ought to defend, when and where this court will consider thereof; and says he is in no ways guilty of the premises; and of this he submits himself to his country; and the said Sir

Raym. En.
115.

P * 146

The imparlance.

Not guilty.

Actions on the Case.

Sir John Dalston thereof does likewise the same; therefore let a jury thereof come before our sovereign Lord the King at Westminster, on Tuesday next after a month from the feast of Easter, and who are no ways related, either to the said Sir John Dalston, or to the said Joshua, to make a jury between the said parties of a plea of trespass upon the case, because as well the said Joshua, as the said Sir John Dalston, between whom the said matter is in variance, have thereof submitted themselves to the jury; the same day is given to the said parties, and so forth.

The award
of the ve-
nire,

The resolu-
tion of the
case.

1 Salk. 10.

Note; Judgment was arrested in this cause after a verdict, because the plaintiff had declared likewise in trover in the same declaration; whereas a contract and a tort could not be joined together, upon the authority of the case of Matthews and Hopkins. 1 Siderf. 244.

Pleas before our Sovereign Lord the King at Westminster, of the term of the Holy Trinity, in the tenth year of the reign of our sovereign Lord William the third, King of England, and so forth.
Roll. 763.

JOHNSON against LONG.

Somersetshire. Be it remembered that heretofore, (*that is to say*) in the term of St. Michael last past, *Timothy Johnson*, by *Philip Hodges* his attorney, came before our sovereign Lord the King at *Westminster, and then brought there into his Majesty's court, his bill against *John Long*, being in the custody of the marshal of the Marshalsea of our sovereign Lord the King, of a plea of trespass upon the case, and there are pledges for the prosecution, (*that is to say*) *John Doe* and *Richard Roe*, which said bill follows in these words.

Somersetshire. *Timothy Johnson* complains of *John Long*, being in the custody of the marshal of the Marshalsea of our sovereign Lord the King; for that whereas the said *Timothy*, on the 21st day of April, in the eighth year of the reign of his said present Majesty, was, and ever since hath been, and now is possessed of an ancient workhouse, situate and being in the parish of *Whatley*, in the county aforesaid, in which said workhouse, on the 21st day of April, in the eighth year aforesaid, there was, and during the time that the memory of man hath not been to the contrary, there hath been a certain ancient window on the western side of the said workhouse, through which the wholesome air and pleasant light, on the said 21st day of April, in the eighth year aforesaid, did, and during the whole time above mentioned, have been used to enter, and brought into

2 Salk. 714.
A declara-
tion for a

P * 147
nufance.

Raym. Ent.

389. 1 L.

Raym. 370.

Carth. 453.

Com. 370.

Salk. 10.

Possession
alleged in
an old
workhouse,

Actions on the Case.

into the said workhouse, to the great advantage and benefit of the occupiers thereof. And whereas the said *John*, on the said 21st day of *April*, in the eighth year aforesaid, was, and ever since hath been, and now is possessed of a certain piece of land, with its appurtenances, situate, lying and being in the said parish of *Whatley*, in the county aforesaid, contiguously adjoining to the said workhouse; and being so thereof possessed the said *John* contriving, and fraudulently intending greatly to grieve and oppress the said *Timothy*, and in order to obstruct the said air and light, which used to enter, and be brought into the said workhouse through the said window, from entering through the said window into the said workhouse, and to render the said shop totally hideous and dark, and thereby wholly to deprive the said *Timothy* of the benefit and advantage of his said workhouse; he the said *John* on the said 21st day of *April*, in the eighth year aforesaid, at *Whatley* aforesaid, in the said county of *Somerset*, erected and built a wall upon his said piece of land so near the said workhouse, as that the said window, by the erection of the said wall, on the said 21st day of *April*, and ever since, to the day of the said *Timothy's* exhibiting his said bill, (*that is to say*) on the 23^d day of *October* in the ninth year of the reign of his said present Majesty, was overshadowed and darkened, whereby the said *Timothy* was totally deprived of, and lost all the benefit and advantage of his said window, and the delight and healthfulness of the air and light, which used to enter, and be brought in upon his said workhouse, through the said window, and all the use and profit of his said workhouse, from the said 21st day of *April*, in the eighth year aforesaid, to the said 23^d day of *October*, in the same year; whereby the said *Timothy* says he is injured and endamaged to the value of forty pounds; and therefore he brings this suit, *and so forth*.

And now at this day, (*that is to say*) on *Friday* next after the morrow of the holy *Trinity* this same term, till which day the said *John* had leave to imparl, and then to make answer to the said bill before our said sovereign Lord the King at *Westminster*, as well the said *Timothy* by his said attorney, as the said *John* by *James Long* his attorney, come before our sovereign Lord the King at *Westminster*, and the said *John* defends the force, injury and damages, and whatever else he ought to defend, when and where the court will please to consider thereof; and says, that the said *Timothy* ought not to have, or maintain his said action against him, because he says that the said *Timothy* heretofore, (*that is to say*) in *Easter* term, in the eighth year of the reign of his present Majesty, in the court of our said sovereign Lord the King, before the King himself at *Westminster*, in the county of *Middlesex*, impleaded the said *John Long* in a plea of trespass upon the case, and declared against him, that whereas he the said *Timothy*, on the 10th day of *October*, in the seventh year of the reign of his said present Majesty, then

The defendant's possession of a piece of land adjoining thereto.

That the defendant obstructed the light, whereby the plaintiff lost the benefit of his shop.

Imparllance
P *148

The defendant pleads another recovery for the same nuisance in bar.

Actions on the Case.

Setting
forth a former
declaration.

then was, and ever since hath been, possessed of a workhouse, situate, lying and being in the parish of *What'ey*, in the county aforesaid, (and so recites, that the plaintiff declared in the same manner as before, only therein mentions, that the defendant built the wall on the 10th day of October, in the seventh year of the reign of his said present Majesty, instead of the time above mentioned in this declaration) and after the words, and therefore he then brought that suit, and so forth, he goes on in this plea in the following manner, and such were the proceedings here in this same court, (*that is to say*) at *Westminster* aforesaid; That after that the said *John* had pleaded that he was not guilty thereof, and it had been found by a certain jury, that he had been guilty thereof, (*that is to say*) in *Michaelmas* term then next following; it was considered here by the same court, that the said *Timothy* should recover against the said *John* fourteen pounds, for the damages which he sustained, as well by occasion of the premises mentioned in the same record, as for his expences and costs by him laid out about his suit in that behalf, as by the record thereof now remaining in this court, (*that is to say*) at *Westminster*, more fully may appear. And the said *John* further saith, that

Averment
of identity.

the said workhouse window, and the erection, and the building the said wall, mentioned in the said recited record, and the said workhouse window, erection and building of the said wall, mentioned and expressed in the bill of the said *Timothy*, exhibited against the said *John Long*, are one and the same, and not different; and that the said *Timothy* named the plaintiff in the said recited record, and the said *John* named the defendant in the said recited record, and the said *Timothy* and *John* respectively named plaintiff and defendant in the above bill of the said *Timothy*, are the same, and not different persons; and this he is ready to verify; wherefore he prays judgment, whether the said *Timothy* ought to have and maintain his said action against him, and so forth.

Demurrer.

And the said *Timothy* says, that he, notwithstanding any thing alledged by the said *John* above in his plea, ought not to be precluded from having his said action against him, because he says, that the said plea, pleaded by the said *John*, in manner and form aforesaid, and the substance therein contained, are in law insufficient to preclude him the said *Timothy*, from having his said action against him the said *John*, to which said plea, he the said *Timothy* is under no necessity, or any ways bound by the law of the land to make an answer; and this the said *John* is ready to verify and prove; whereupon for want of a sufficient answer in this particular, the said *Timothy* prays judgment, and that his damages occasioned by the premises may be awarded to him, and so forth.

P *149

Joinder.

And the said *John* says, that his said plea, pleaded in manner and form aforesaid, and the substance therein contained, are in law good and sufficient to preclude him the said *Timothy* from having his said action against the said *John*; which said plea, and the substance therein

Actions on the Case.

therein contained, the said *John* is ready to verify and prove, as this court shall please to direct; and because the said *Timothy* hath not answered the said plea, nor as yet any ways denied the substance therein, the said *John* as above prays judgment, and that the said *Timothy* may be precluded from having his said action against him, *and so forth*; but because this his present Majesty's court is not yet determined what judgment to give, of, and concerning the premisses, a day therefore is given to the parties, to be before our sovereign Lord the King at *Westminster*, till *Wednesday* next after the octave of *St. Martin*, to hear their judgment thereof, *and so forth*; for that the court of our said sovereign Lord the King are not yet determined, *and so forth*; at which day the said parties by their attornies came before our said sovereign Lord the King at *Westminster*; whereupon all and singular the premisses being fully understood, and upon mature deliberation thereof had by the court of our said sovereign Lord the King now here, it appears to the said court, that the said plea, pleaded by the said *John*, in manner and form aforesaid, and the substance therein contained, are in law good and sufficient to preclude the said *Timothy* from having his said action against the said *John*; and therefore it is considered, that the said *Timothy* shall take nothing by his said bill, but that for his groundless claim he be in the mercy of the court, and that the said *John* be therefrom for ever dismissed. Continu-
ance.

And it is further considered, that the said *John* should recover against the said *Timothy*, six pounds and ten shillings, by his said Majesty's court here awarded to the said *John*, with his consent, for his expences and costs sustained by him in defending this suit, according to the form of the statute in such case made and provided; and the said *John* may have his execution thereof, *and so forth*. Judgment
for the de-
fendant.

This case is reported in 1 Salk. 10. and judgment, as may be observed above, was given for the defendant; for though a man may have an action for the continuance of a nuisance, yet he can never have a new action for the same erection. The case.

Actions on the Case.

*150 *COMBES against the hundred of BRADLEY.

4 Mod. 296. *Gloucestershire.* The inhabitants of the hundred of *Bradley*, in
 An action upon the statute of Winton, for a robbery.
 Comb. 263 *Edward* the first, at *Winton*, in the 13th year of his reign, reciting
 Holt. 37. amongst other things, 'that for as much as from day to day, robberies, murders, burnings and theft, had been oftener used than they
 The act of 12 54 Mod. 'had been theretofore; and that felons could not be attainted by
 13. Edw. 'the oath of jurors, which rather suffered strangers to be robbed,
 1. 'and so passed without punishment, than to indict the offenders, of
 'whom great part had been people of the same country; or at
 'least if the offenders had been of another country, the receivers
 'were of places near, and that they did the same, because an oath
 'was not given to the jurors of the same country where such felonies were done, and to the restitution of damages then hitherto
 'no penalties had been limited on them for their concealment and
 'latches; it is ordained, and the said late King to abate the power
 'of felons, established a pain in that case, so that from thenceforth
 'for fear of the pain, more than for fear of any oath, they should
 'not spare nor conceal any felonies; and commanded that Cries
 'should be solemnly made in all counties, hundreds, markers, fairs,
 'and all other places, where great resort of people should be, so
 'that none should excuse himself by ignorance; that from thenceforth every country should be so well kept, that immediately upon
 'such robberies and felonies committed, fresh suit should be made
 'from town to town, and from country to country; and that likewise when need required, inquests should be made in towns by
 'him, that should be lord of the town, and after in the hundred,
 'and in the franchise, and in the county, and sometimes in two,
 'three, or four counties, in case when felonies should be committed
 'in marches of shires, so that the offenders might be attained. And
 'if the country would not answer for the bodies of such manner of
 'offenders, the pain should be such, that every country, (that is to
 'say) the people dwelling in the country, should be answerable
 'for the robberies done, and also the damages, so that the whole
 'hundred where the robbery should be done, with the franchises,
 'being

Actions on the Case.

‘ being within the precinct of the same hundred; should be answerable for the robberies done; and if a robbery had been done in a division of two hundreds, both the hundreds, and the franchises within them, should be answerable; and after that the felony or robbery should be so done, the country should have no longer space than half a year; within which half year it should behove them to agree for the robbery or offence, or else that they should answer for the bodies of the offenders, as in and by the same statute more fully may appear.’ And whereas certain offenders unknown

to the said *Thomas*, on the 23d day of *February*, in the fifth year of the reign of their said present Majesties, at *Hampton*, within the hundred of *Bradley*, in the county of *Gloucester*, in the King’s highway, there assaulted the said *Thomas* with force and arms, and feloniously took, plundered, and carried away from the said *Thomas* 30l. 2s. 6d. in money, of the proper monies of the said *Thomas*, against the peace of our said sovereign Lord and Lady the King and Queen; and the said *Thomas*, immediately after the said felony and theft committed as aforesaid, made hue and cry of the said robbery and felony at *Northleech*, within the hundred aforesaid, and then and there gave notice of the said robbery and felony to the inhabitants of the said vill of *Northleech*; and within twenty days before suing out the original writ of the said *Thomas*, he the said *Thomas* was examined upon his corporal oath before *Thomas Masters*, Esq. then an inhabitant of *Cirencester*, near the said hundred of *Bradley*, in the county aforesaid, and then, and now one of their Majesty’s justices appointed to keep the place within the said county of *Gloucester*, according to the form of the statute, made and published in the 27th year of the reign of our late sovereign Lady Queen of *England*, and so forth; and the said *Thomas Combes* upon his said oath declared he knew not the parties that committed the said robbery or either of them; and within forty days after the said robbery committed, the said inhabitants of the said hundred, have not made the said *Thomas Combe* any amends for the said robbery, nor have they yet answered for the bodies of the said felons or offenders, or taken the bodies or body of them, or either of them, but have suffered the said felons and offenders to escape, in contempt of our said sovereign Lord and Lady the King and Queen, to the great damage of the said *Thomas Combes*, and contrary to the form of the said statute in such case made and provided; whereupon the said *Thomas Combes*, who sues in this case as well for our sovereign Lord and Lady the King and Queen as for himself, by *Samuel Brewster* his attorney complains, that whereas certain offenders unknown to the said *Thomas Combes*, in the King’s highway, on the 23d day of *February* (and so the declaration in the precedent goes on in the same manner, as the above recited original, to the words, but suffered the said felons and offenders to escape; which to avoid prolixity I will not here insert, and then the precedent goes on) in contempt of our

Sets forth
the robbery.

P * 151
The money
taken.
According
to the act of
27 Eliz.

Oath made
before a
justice of
the peace.

said

Actions on the Case.

said sovereign Lord and Lady the King and Queen, to the great damage of the said *Thomas Combes*, and contrary to the form of the said statute published in the said 13th year of the reign of our said late sovereign Lord King *Edward* the first; whereupon the said *Thomas Combes* says, he is injured and endamaged to the value of fifty pounds; and therefore he brings this suit, and so forth.

Not guilty
pleaded.

A suggesti-
on for a ju-
ry of an-
other hun-
dred.

P * 152

The award
of the ve-
nire.

And the said inhabitants of the said hundred of *Bradley*, by *Richard Longford* their attorney, come and defend the force, injury and damages, and whatever else they ought to defend, when and where the court will please to consider thereof, and say that they are in no wise guilty of the premises charged upon them, as the said *Thomas Combes* (who in this case sues as well for our said sovereign Lord and Lady the King and Queen, as for himself) above complains against them; and of this they submit themselves to their country; and the said *Thomas Combes* (who in this case sues, as well for our said sovereign Lord and Lady the King and Queen, as for himself) does likewise the same. And hereupon the said inhabitants of the said hundred of *Bradley*, where the said robbery was committed, are parties defendants, against whom the said *Thomas Combes* (who sues in this case, as well for our said sovereign Lord and Lady the King and Queen, as for himself) above complains in the manner as aforesaid; and for that reason he prays their said Majesty's writ to be directed to the sheriff of the county aforesaid, to cause twelve free and lawful men of the neighbouring hundred of *Slaughter* in the said county, who are in no wise related either to the said *Thomas Combes*, (who in this case sues as well for our said sovereign Lord and Lady the King and Queen, as for himself) or to the said inhabitants of the said hundred of *Bradley*; which said hundred of *Slaughter* is the next adjoining hundred in the said county, to the said hundred of *Bradley*; and because the said inhabitants of the said hundred of *Bradley* do not deny this matter, it is granted to him, and so forth. Therefore the sheriff is commanded, that he cause twelve free and lawful men of the hundred of *Slaughter*, each of which to have ten pounds a year at least of lands, tenements or rents, whereby the truth of the matter will be the better known, and who are in no wise related, either to the said *Thomas Combes* (who in this case sues as well for our said sovereign Lord and Lady the King and Queen, as for himself) or to the said inhabitants of the said hundred of *Bradley*, to recognize and make a jury of the county between the said parties, because as well the said inhabitants of the said hundred of *Bradley* as the said *Thomas Combes*, who and so forth, have thereof submitted themselves to the jury.

The entry
to introduce
the postea.

Afterwards, the proceedings thereof are continued between the said parties of the said plea, the jury being respited thereof between them, before our said sovereign Lord and Lady, the King and Queen, until from the day of the feast of *Easter*, in fifteen days, wherever our said sovereign Lord and Lady the King and Queen shall

Actions on the Case.

shall then be in England, from thence next following, unless their said Majesty's justices, appointed to hold the assises, in and for the said county of Gloucester before, on Saturday the third day of March, at Gloucester in the said county, by force of the statute in that case made and provided, should come for the default of jurors, at which day the said parties, by their said attornies, came before our sovereign Lord and Lady the King and Queen, at Westminster, and the said justices of our said sovereign Lord and Lady the King and Queen, before whom the said matter in variance was tried, sent hither their record had before them in these words. *After-* The Postea.
*wards the day and place within contained, as well the within named Thomas Combes, who in this case sues as well for our said sovereign Lord and Lady the King and Queen, as for himself, as the within mentioned inhabitants of the hundred of Bradley, by their within written attornies, came before Sir Giles Eyre, knight, one of their Majesty's justices, assigned to hold pleas before their said Majesties, and Thomas Breton, Esq. by force of the statute in that case made and provided, associated for this purpose, by virtue of their Majesty's writ, commonly called the writ Si non Omnes, to the said Giles Eyre, and Sir Nicholas Lechmere, knight *one of the barons of their said Majesty's court of Exchequer, their said Majesty's justices, appointed by force of the statute in that case made and provided, to hold the assizes in and for the said county of Gloucester, (the presence of the said Sir Nicholas Lechmere not being expected,) and so forth.* And the jurors of that jury, whereof mention is made within, being elected, tried and sworn, to declare the truth of the within contents, say upon their oaths that certain offenders unknown to the said Thomas, on the 22d. day of February, A special
in the fifth year of the reign of our said sovereign Lord and Lady the King and Queen, assaulted the said Thomas with force and arms, in the King's highway, at Hampton in the hundred of Bradley, in the said county of Gloucester, and feloniously took, plundered, and carried away from the said Thomas 30l 10s. 6d. in money, there found by them upon the said Thomas, against the peace of our sovereign Lord and Lady the King and Queen; and the said Thomas immediately after the felony, robbery and plunder within mentioned, made the said hue and cry, at Northleach within the said hundred, of the within written robbery and felony, and then and there gave due notice of the within written robbery and felony, to the inhabitants of the said vill of Northleach; and after the said robbery and felony so committed, and within twenty days before suing out the said original writ of the said Thomas, he the said Thomas was examined upon his corporal oath, before the within written Thomas Masters, Esq. then, and now one of the justices of our said sovereign Lord and Lady the King and Queen, appointed to keep the peace in the said county of Gloucester he the said Thomas Masters being an inhabitant in Cirencester, in the said
county

Actions on the Case.

county of *Gloucester*, near the hundred of *Bradley* in the county aforesaid, according to the statute for that purpose, made and provided in the 27th year of the reign of our late sovereign Lady *Elizabeth* Queen of *England*, and so forth; and upon his corporal oath, he then deposed before the said *Thomas Masters*, in the manner and form hereafter mentioned, and no otherwise. *Gloucester*.—

The oath
of the party
robbed.

P *154

‘ Be it remembered, that upon the 7th day of *June*, in the fifth year of the reign of our sovereign Lord and Lady *William* and *Mary*, King and Queen of *England*, and so forth, in the year of our Lord 1693. *Thomas Combes* of *Fairford*, in the county of *Gloucester*, servant to *Andrew Barker* of *Fairford*, aforesaid, Esq. came before me *Thomas Masters*, Esq. one of their Majesty’s justices of the peace, for the said county of *Gloucester*, and took his corporal oath, That upon *Thursday* the 23d day of *February* last past, between the hours of two and three of the clock in the afternoon of the same day, as the said *Thomas* was travelling from *Fairford* aforesaid, towards *Tewsbury* in the said county of *Gloucester*, he was set upon in a field near *Hampton*, in the hundred of *Bradley*, in the said county of *Gloucester*, by three horsemen, armed with swords and pistols, who there made an assault upon the said *Thomas Combes*, and did then and there feloniously take from him the said *Thomas Combes* 30l. 12s. 6d. and one sorrel mare, which mare is since returned to *Fairford* aforesaid, 30l. 11s. of which said money, was the proper money of the said *Andrew Barker* his master, and the * other one shilling and six pence was the proper money of him the said *Thomas Combes*. And the said *Thomas Combes* farther deposed, that the said three horsemen, which so took away the said money and mare from him, were strangers, and altogether unknown to him the said *Thomas Combes*; and that the said *Thomas Combes*, immediately after he was so robbed, went to *Northleach*, a market-town in the said hundred, and there made a hue and cry after the said persons that robbed him’.—— And the said jury upon their said oaths further say, that the thirty pounds twelve shillings and six pence, mentioned in the within written declaration, were the proper monies of *Andrew Barker*, Esq. then master to the said *Thomas Combes*, in the possession of the said *Thomas Combes*, for the use of the said *Andrew Barker* his master; and the said jurors further upon their oath say, that the said *Andrew Barker* was not present when the said robbery was committed; but whether, upon the whole matter found by the said jurors in the manner as above, the said inhabitants of the hundred of *Bradley* were guilty of the premisses charged upon them in the within written declaration, according to the form of the statute in the within written declaration, or no, the said jurors are altogether ignorant; and therefore they pray the advice and consideration of the court, and so forth. And if upon the said whole matter found by the said jurors, in the manner as above set forth, it will appear

Actions on the Case.

appear to the court of our said sovereign lord and lady the king and queen here, that the said inhabitants of the said hundred of *Bradley* are guilty of the Premises in the within written declaration, charged upon them, against the form of the said statute; the said jurors upon their said oaths say, that the said inhabitants of the said hundred of *Bradley* are thereof guilty; as the said *Thomas Combes*, who in this case sues, as well for our said sovereign lord and lady the king and queen, as for himself, within complains against them, and they assess the damages of the said *Thomas Combes* on the within written occasion besides his expences and costs laid out by him about his suit in this behalf, to thirty pounds twelve shillings and six pence, and for his expences and costs, to forty shillings; but if upon the whole matter found by the said Jury in the manner as above, it shall appear to the court of our sovereign lord and lady the king and queen, that the inhabitants of the said hundred of *Bradley* are not guilty of the said premises; then the said jurors upon their oath say, that the said inhabitants of the hundred of *Bradley* are not guilty, as the said inhabitants of the said hundred of *Bradley* have within alledged in their defence. But because the court of our said sovereign lord and lady the king and queen here are not determined what judgment to give, of and concerning the premises; a day therefore is given to the said parties, before our said sovereign lord and lady the king and queen, until —for their hearing their judgment thereupon; because the said court of our said sovereign lord and lady the king and queen are not yet determined thereupon, *and so forth*,

The continuance.

*The question upon a motion in arrest of judgment here was, P *155 whether the servant being robbed of his master's money, he being The resolution of the not present, might bring the action against the hundred, and de- tion of the case. *clare de denariis suis propriis*.

After several debates, the plaintiff had his judgment, by the opi- 4 Mod 303 nion of the whole court; and it was held that in this case, either the master or the servant might bring the action.

Trinity, the Twelfth of King George.

London. *Thomas Lane* complains of *Richard Thornhill*, being in the custody of the Marshal of the *Marshalsea*, of our Sovereign Lord the King, before the King himself; for that whereas on the 17th day of *June*, in the year of our Lord 1726, at *London*, (that is to say) in the parish of *St. Peter the poor*, in the ward of *Broadstreet*, it was agreed between the said *Thomas* and *Richard*, that the said *Richard* should sell, and at the then next opening of the transfer-books of the Governors and company of Merchants of *Great-Britain*, trading to the *South Seas*, and other parts of *America*, for

A declaration upon an agreement to transfer 1000l. South Sea stock. The agreement of the Defendant to sell the stock.

Actions on the Case.

encouraging the Fishery, should transfer to the said *Thomas* 1000*l.* interest or stock, in the principal and capital fund or stock of the Governors and Company aforesaid ; And that the said *Thomas*, at the then next opening of the said Books, should accept from the said *Richard* the transfer of the said 1000*l.* credit in the said stock ; and thereupon in consideration that the said *Thomas*, then and there at the special Instance and request of the said *Richard*, undertook, and then and there faithfully promised, that he the said *Thomas* would well and truly perform, all and every thing contained in the agreement, on his part to be performed, he the said *Richard* then and there undertook, and faithfully promised the said *Thomas*, that he the said *Richard* would well and truly perform and fulfil all things contained in the said agreement on the part of the said *Richard* to be performed. And the said *Thomas* in fact saith, that the usual place for the transferring of the stock of the said Company from one to another then was and now is at the *South Sea House*, situate in a certain street called *Broad-Street London*, in the parish and ward aforesaid, in a certain Room of the same House, commonly called the transfer-room, kept for that purpose, and not elsewhere, between the hours of nine in the morning and one in the afternoon of the same Day, and not at any other time of the Day ; and that the first time of opening the Books of the said Company, next after the said 17th day of *June*, and after the said agreement for the transferring of the stock of the said Company, was on the third day of *August*, in the said year of our Lord, and not before ; And that he the said *Thomas*, on the same third day of *August*, in the said year of our Lord, came to the said *South Sea House*, at, and in the said Room called the transfer-room, in the parish and ward aforesaid, half an hour before the said hour of one in the afternoon of the said Day, and till the shutting up of the transfer-Books, and was then and there ready to accept from the said *R.* the said 1000*l.* credit in the said stock, and to pay for the same to the said *Richard*, at and according to the rate aforesaid, according to the form and effect of the said agreement. Nevertheless the said *Richard*, not regarding his said promise and undertaking made as above, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Thomas* in this particular, came not there on the said third day of *August*, in the said Year, during all that time, either by himself, or any other person, to transfer to the said *Thomas*, the said 1000*l.* credit in the said stock, according to his said promise and undertaking ; nor hath the said *Richard* at any time since transferred to the said *Thomas* the said one thousand Pounds stock, or any part thereof, but hitherto hath, and still doth refuse so to do. And whereas the said *Richard* on the same 17th day of *June*, in the said year, at the parish and ward aforesaid, bargained and sold to the said *Thomas*, one other thousand Pounds credit in the said stock at and according to the rate of 102*l.* for

To be transferred at the next opening of the books.

Averment of the promise to perform the agreement

Averment of the time when was the first opening of the books

The usual hours.

Averment that the plaintiff was there ready to accept the transfer.

P * 156

Breach that the Defendant was not there ready to transfer.

Laid another may.

Actions on the Case.

for every 100*l.* of the said stock in the whole, according to that estimation, amounting to 1020*l.* he the said *Richard*, on the said 17th day of *August*, in the said year of our Lord, in the parish and ward aforesaid, (in consideration that the said *Thomas* would well and truly pay to the said *Richard*, upon the transfer of the said last mentioned 1000*l.* credit in the said stock) undertook and then and there faithfully promised, that he the said *Richard* would well and truly transfer the said last mentioned 1000*l.* credit in the said stock, in the transfer-Books of the said Company, upon the said third day of *August*, in the above said year, being the then next time of opening of the said transfer-Books of the said Company, at the said House, called the *South-Sea House*, situate in the said street, called *Broadstreet London*, in the parish and ward aforesaid. Nevertheless he the said *Richard* not regarding his said promise and undertaking last mentioned, but contriving, and fraudulently intending in this particular, craftily and subtilly to deceive and defraud the said *Thomas*, did not transfer the said last mentioned 1000*l.* credit in the said stock, or any part thereof, to the said *Thomas*, upon the said third day of *August*, although the said *Thomas* on the same third day of *August*, in the aforesaid year, was ready at the said *South-Sea house*, in the parish and ward aforesaid, upon his the said *Richard's* transferring the said last mentioned 1000*l.* credit in the said stock, to pay to the said *Richard* the said 1020*l.* but the said *Richard* hitherto altogether hath, and still doth refuse to transfer the same. And whereas afterwards, (*that is to say*) on the same 17th day of *June*, in the said year at *London* aforesaid, in the said parish and ward, a certain discourse was had and arose between the said *Thomas* and *Richard*, of and concerning other stock in the said company; upon which discourse it was then and there agreed between the said *Thomas* and *Richard*, that the said *Richard* should sell and transfer, at the then next opening of the books of the said company, another 1000*l.* credit in the said stock; and that the said *Thomas*, upon the transfer of the said last mentioned 1000*l.* credit in the said stock, by the said *Robert* to the said *Thomas* so to be made, should accept the same transfer, and should pay to the said *Richard* for the said last mentioned 1000*l.* credit in the said stock, at and after the rate of 102*l.* for every 100*l.* of the said last mentioned 1000*l.* stock; and thereupon in consideration that the said *Thomas*, on the same 17th day of *June*, *in the said year, at *London* aforesaid, in the said parish and ward, at the special instance and request of the said *Richard*, had undertaken, and had then and there faithfully promised the said *Richard*, to perform the said last mentioned agreement in every thing to be performed and fulfilled on his part; the said *Richard* then and there undertook, and faithfully promised the said *Thomas*, that he the said *Richard* would well and truly perform and fulfil every thing contained in the said last mentioned agreement, on his part to be performed and fulfilled.

Laid another way.
What such a day there was a colloquium about south-sea stock.
An agreement that the defendant should transfer another 1000*l.* stock to the plaintiff, that the plaintiff should pay him 102*l.* per cent.

Actions on the Case.

And the said *Thomas* in fact saith, that the said books of the said company, for transferring their said stock, after the said 17th day of *June*, were first opened on the said third day of *August*, in the said year of our Lord, (*that is to say*) at the said house of the said company, called the *South Sea* house, in a certain room there in the said parish; and that then and there, and not elsewhere, the stock of the said company was transferred from the hour of nine in the forenoon, until the hour of one in the afternoon of that day, and not afterwards. And the said *Thomas* further saith, that he the said *Thomas*, on the same third day of *August*, in the said year, was at the said house called the *South Sea* house, situate in *Broadstreet*, in the said parish and ward, ready to accept from the said *Richard* a transfer of the said 1000*l.* credit, and to pay for the same to the said *Richard*, at the rate aforesaid, according to the form and effect of the said last mentioned agreement. Nevertheless the said *Richard*, not regarding his said last mentioned promise and agreement, but contriving and fraudulently intending in this particular, craftily and subtilly to deceive and defraud the said *Thomas*: Although the said *Richard* on the same 17th day of *June*, in the said year, at *London* aforesaid, in the said parish and ward, had sold to the said *Thomas* the said last mentioned 1000*l.* credit in the said stock, and although the said *Richard* on the said third day of *August*, in the said year, in the parish and ward aforesaid, was by the said *Thomas*, often requested to transfer the said last mentioned 1000*l.* credit, in the said stock of the said company, to the said *Thomas*, according to the tenour and effect of his said last mentioned agreement; yet the said *Richard* did not transfer the said last mentioned 1000*l.* credit in the said stock to the said *Thomas*, upon the said third day of *August* in the said year, in the parish and ward aforesaid, according to the tenour and effect of his said last mentioned agreement. And whereas the said *Richard* afterwards, (*that is to say*) on the same 17th day of *June*, in the said year, at *London* aforesaid, in the said parish and ward, had bargained and sold to the said *Thomas* another 1000*l.* credit, in the stock of the said company, at and according to the rate of 102*l.* for every 100*l.* of the last mentioned 1000*l.* in the whole amounting to 1020*l.* to be paid to the said *Richard* by the said *Thomas*, upon the transfer of the said last mentioned 1000*l.* credit in the said stock; and thereupon the said *Richard* on the same 17th day of *June*, in the said year, at *London* aforesaid, in the said parish and ward, in consideration thereof, undertook, and then and there faithfully promised the said *Thomas*, that he the said *Richard* would transfer to the said *Thomas* the said last mentioned 1000*l.* credit in the said stock, in the transfer books of the said company, at the house called the *South-Sea* house, situate in a street called *Broadstreet* *London*, in the said parish and ward. Nevertheless the said *Richard*, not regarding his said last mentioned promise and undertaking, made in the manner

Averment of the time of opening the books,

Averment of the plain tiff's being there ready to accept the transfer

The breach

Laid another way

Actions on the Case.

as above set forth, but contriving, and fraudulently intending craftily and subtilly to deceive the said *Thomas* in this particular, did not transfer the said 1000*l.* credit in the said stock, or any part thereof, upon the said third day of *August*, although the said *Thomas* on the said third day of *August*, in the year aforesaid, was ready at the said *South-Sea* house in the said parish to pay to the said *Richard* the said 1020*l.* upon his transferring the said 1000*l.* credit in the said stock, in the manner as above agreed to be done, to the damage of the said *Thomas* 1500*l.* and therefore he brings this suit, *and so forth*

This declaration was perused and settled by Counsellor *Strange*.

Hillary, the Fifth of King *George* the Second.

Middlesex. *James Hambleton*, late of the parish of *St. Andrews* A declarati-
Holborne, Coachman, was attach'd to answer to *John Scarborough* of on for dr -
a plea of trespass upon the case; and whereupon the said *John*, by ving a
Robert Martin his attorney, declares, that whereas on the first day a coach over
of *September*, in the year of our Lord 1721, at the parish of *St. John* and thereby
Hackney, in the king's highway, there he the said *John* was jour- bruising the
neying in a chaise, and he the said *James* was at the same time plaintiff.
there driving a coach; and the said *John* in fact avers, that the said
James then and there so improvidently and carelessly managed his
cattle, that were then and there drawing the said coach, so that
the said cattle drew the said coach upon the said chaise, in which
the said *John* was so journeying, so that the said chaise then and
there, by the negligence of the said *James*, was overturned by the
said coach, and the said *James* was much bruised thereby. And The Plain-
whereas also afterwards, (*that is to say*) the same day and year tiff not
above at *Hackney* aforesaid, in the said county, he the said *John* knowing
was driving another chaise in the said king's highway, in the said whether it
parish of *St. John Hackney*, in the county aforesaid, and then was the de-
there a certain person, unknown to the said *John*, who at that time fendant him
was a servant to the said *James*, was driving another coach, of and self, or one
belonging to the said *James*; and the said *John* doth in fact aver, of his ser-
that the said servant of the said *James* then and there drove and vants; here
whip'd his cattle drawing the said coach, in such a negligent and is another
careless manner, that the same cattle drew the said coach upon the charge up-
last mentioned chaise, in which the said *John* was then and there on the ser-
aforesaid, so that the said chaise last mentioned was then and there vant of the
overturn'd, by means whereof the said *John* was grievously bruised like nature.
and wounded; whereupon he the said *John* saith, that he is injur-

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ed and endamaged to the value of fifty pounds ; and therefore brings this suit, *and so forth.*

This declaration was perused and settled by Mr. Serjeant *Hawkin's*, but the cause was never tried ; however I was inform'd that the defendant's attorney, upon advice with counsel, was told the declaration was well drawn.

P *159 *Easter Term, the Third, King George the Second.

A declara-
tion for not
marrying
the plaintiff
pursuant to
the defen-
dant's pro-
mise.

Suffolk. *Elizabeth Hayward* complains of *Stephen Cook Mosley*, Esq. being in custody of the marshal of the *Marshalsea* of our so-
vereign Lord the King, before the King himself ; for that whereas
he the said *Stephen Cooke Mosley*, on the 22d day of *January*, in the
year of our Lord 1724, (then being a person unmarried) at *St. Ed-
monds Bury*, in the county of *Suffolk*, in consideration that she the
said *Elizabeth* (then and yet being a person unmarried) at the spe-
cial instance and request of the said *Stephen Cooke*, had then and
there agreed with the said *Stephen*, and then and there undertook,
and faithfully promised the said *Stephen*, that she the said *Elizabeth*
would take the said *Stephen Cooke* to be her husband, and be coupled
with him in lawful matrimony, he the said *Stephen Cooke* undertook,
and then and there faithfully promised the said *Elizabeth*, that he the
said *Stephen Cooke* would take the said *Elizabeth* to be his wife,
and be coupled with her in lawful matrimony. And although she
the said *Elizabeth* giving credit to the said promise and under-
taking of the said *Stephen Cooke*, hath hitherto refused to contract
matrimony with other persons, who had offered to marry her, and
she now continues unmarried, and although she the said *Eliza-
beth* hath always been ready and willing, from the time of making
the said promise and undertaking, to take to husband, and be
married to the said *Stephen Cooke*, at the said parish and county
aforesaid, according to the tenor of her said promise and under-
taking : Nevertheless the said *Stephen Cooke*, not regarding his said
promise and undertaking, but contriving, and fraudulently intend-
ing craftily and subtilly to deceive and defraud the said *Elizabeth*
in this particular, and totally to hinder the said *Elizabeth* of her
preferment in marriage, hath not taken the said *Elizabeth* to wife,
according to his said promise and undertaking, made for that pur-
pose as aforesaid. And whereas also afterwards, (*that is to say*)
the same day and year last above mentioned, at the said parish, in
the county aforesaid, in consideration that the said *Elizabeth*, at the
special instance and request of him the said *Stephen Cooke*, then and
there undertook, and faithfully promised the said *Stephen Cooke* to
marry

Laid an-
other way.

Actions on the Case.

marry the said *Stephen Cooke*, he the said *Stephen Cooke* undertaking and faithfully promised the said *Elizabeth*, that he the said *Stephen Cooke* would be joined to the said *Elizabeth* in lawful matrimony. And although she the said *Elizabeth* was always ready and willing from the time of the making her said promise and undertaking, to be joined to the said *Stephen Cooke* in lawful matrimony, (*that is to say*) at the said parish, in the county aforesaid: Nevertheless he the said *Stephen Cooke*, not regarding his said last mentioned promise and undertaking, but contriving, and fraudulently intending to deceive and defraud the said *Elizabeth* in this particular, and totally to hinder the said *Elizabeth* from the preferment and good fortune that she would have met with by such marriage, hath not taken the said *Elizabeth* to wife; nor is the said *Stephen Cooke* willing to be joined in matrimony to the said *Elizabeth*, but the said *Stephen Cooke* hath hitherto altogether refused so to do. And although he the said *Stephen* afterwards, (*that is to say*) the 22d day of *January*, in the year of our Lord 1725, and * oftentimes before, P * 160 and after that time hath been thereto requested by the said *Elizabeth*, he the said *Stephen Cooke* always hitherto hath, and still doth refuse so to do, whereby she the said *Elizabeth* declares, that she is injured and endamaged to the value of 500*l.* and therefore brings this suit, *and so forth.*

This declaration was likewise settled by Serjeant *Hawkins*, but the defendant died before the cause came on to be tried.

Of *Trinity Term*, in the 13th Year of the Reign
of our Sovereign Lady *Anne*, now Queen of
Great Britain, and so forth.

London. Be it remembered that heretofore, (*that is to say*) in A declaration
Easter term last past, *Richard Williams*, and *Hannah* his wife, came tion for
before our sovereign Lady the Queen at *Westminster*, by *Richard* maliciously
Purfell their attorney, and then brought there into the court of our causing the
said sovereign Lady the Queen, their bill against *Anthony Palmer*, plaintiff to
being in the custody of the marshal of the *Marshalsea* of our said be impris-
sovereign Lady the Queen, of a plea of trespass upon the case; and oned and
there are pledges for the prosecution, (*that is to say*) *John Doe* and indicted for
Richard Roe; which said bill follows, in these words, (*that is to felony.*
say) *London.* *Richard Williams*, and *Hannah* his wife, complain of
Anthony Palmer, being in the custody, of the marshal of the
Marshalsea of our sovereign Lady the Queen, before the Queen
herself; for that whereas she the said *Hannah* now is a good,
honest,

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That the
plaintiff
Hannah
was of good
fame, &c.

And free
from the
charge, im-
putation, or
suspicion
of felony.

That the
defendant
with others
caused her
to be im-
prisoned on
a suspicion
of felony.

P *161

And exhib-
ited a bill
of indict-
ment
against her.

honest, true and faithful subject of our said sovereign Lady the Queen, and hath all her life-time hitherto carried and behaved herself amongst all her neighbours, and other faithful subjects of our said sovereign Lady the Queen and her predecessors, so as to be esteemed by them of a good name, fame, credit, honest, and faithful conversation and good behaviour; and all her life-time hitherto hath lived, remained, and continued without any blot, or having committed any felony or larceny, and hath always been untouched, unsuspected, and free from the suspicion and imputation of any such execrable and horrible crime; by reason of which good name, fame, credit and honest conversation, she the said *Hannah* had not only gained to herself the love and favour of her husband, and all her neighbours, but hath also reaped and enjoyed great advantages arising therefrom. Nevertheless the said *Anthony*, together with one *Richard Hewett* and *Sarah* his wife, being in no wise ignorant of the premises, but contriving, and maliciously intending unjustly to grieve the said *Hannah*, and to injure and detract her the said *Hannah* in her good name, fame, credit and reputation, but also to subject and bring her into danger of losing her life, on the first day of *April*, in the 12th year of the reign of our said sovereign lady the Queen, in the parish of *St. Buttolph*, in *Port-Soken* ward, falsely and maliciously laid a charge of felony against the said *Hannah*, and to that end and purpose, caused and procured her the said *Hannah* to be imprisoned, and detained in prison for a long time, (*that is to say*) for the space of fifteen days. And afterwards, (*that is to say*) on the 13th day of *April*, in the said year at *London* aforesaid, in the said parish and ward, he the said *Anthony*, together with the said *Richard Hewett* and the said *Sarah* his * wife, out of their further malice which they had against the said *Hannah*, falsely and maliciously, and without any true or lawful cause, exhibited a bill of indictment at the general quarter sessions of the peace of our said sovereign Lady the Queen, held for the said city of *London*, at the *Guild Hall* of the same city, and within the same city, on the 13th day of *April*, in the 12th year aforesaid, at *London* aforesaid, in the said parish and ward, before Sir *Richard Hoar*, knight, mayor of the said city of *London*, Sir *Thomas Abney* knight, one of the aldermen of the said city, Sir *Peter King*, knight, recorder of the said city, and Sir *Charles Peers*, knight, another alderman of the said city, and others their companions her said Majesty's justices appointed to keep the peace, in and for the said city, and also to hear and determine divers felonies, trespasses, and other offences committed within the same city, exhibited a bill of indictment against the said *Hannah*, by the name of *Hannah Williams* late of *London* spinster, otherwise called *Hannah Williams*, wife of *Richard Williams*, late of *London* labourer, to the jury of the grand inquest, duly impanelled, sworn and charged at the said general quarter sessions of the peace, then and there held, to in-
quire

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quire for our said sovereign Lady the Queen, and the body of the said city; thereby charging, that she the said *Hannah*, on the first day of *April*, in the 12th year of the reign of our said sovereign Lady *Anne*, Queen of Great Britain, France, and Ireland, defender of the faith, *and so forth*, about the hour of eleven in the forenoon of the same day, with force and arms, *and so forth*, feloniously broke and entered the dwelling house of one *Richard Hewett*, then and there situate (the said *Sarah Hewett*, the wife of the said *Richard Hewett*, then and there being in the said dwelling house) and that she the said *Hannah* then and there feloniously stole, took, and carried away, of and from the monies of the said *Richard Hewett*, one piece of golden coin called a guinea, of the value of one and twenty shillings and six pence, and fifteen shillings in money, then and there being found in the said dwelling house, against the peace of our said sovereign Lady the Queen, her crown and dignity, and then and there falsely and maliciously affirmed, that the said bill of indictment was true; whereby the sheriffs of *London* aforesaid were commanded, that they should not omit, *and so forth*, but they should take the said *Hannah Williams* to answer, *and so forth*; which said indictment the said justices of the peace, afterwards, (*that is to say*) at a gaol-delivery of *Newgate*, of our said sovereign Lady the Queen, held at *Justice-Hall*, in the *Old Baily*, in the parish of *St. Sepulchres*, in the ward of *Farringdon* without, for the said city of *London*, on *Wednesday*, (*that is to say*) the 15th day of the same month of *April*, in the 12th year aforesaid, before Sir *Richard Hoar*, knight, mayor of the said city of *London*, Sir *Thomas Parker* knight, appointed to hold pleas before the said Queen herself, *Robert Tracy*, Esq. one of her Majesty's justices of the bench, Sir *Thomas Abney*, knight, and Sir *Samuel Garrard*, bart. aldermen of the said city, Sir *Peter King*, knight, recorder of the same city, and others their companions, justices of our said sovereign Lady the Queen, appointed to deliver her said Majesty's gaol of *Newgate* from prisoners (then being there) with their own hands, delivered into the same court of record, to be determined in due * form of law, *and so forth*. P * 162

And thereupon the said *Hannah Williams* under the custody of Sir *William Lewen*, knight, and Sir *Samuel Clarke*, knight, Sheriffs of the said city, came to that same gaol-delivery of her said Majesty's gaol of *Newgate*, held for the said city of *London*, at *Justice-Hall* aforesaid, on the said *Wednesday* the said 15th day of *April*, in the year aforesaid, before her said Majesty's justices last above named, and others their said companions, was led to the bar in the said court in her proper person, and was committed to the custody of the said sheriffs; and immediately the said *Hannah Williams* was allowed to acquit herself from the said felony above charged upon and pleaded of her in the said indictment; and for that purpose the said *Hannah Williams* pleaded, that she was not guilty thereof; and thereof submitted guilty.

The felony charged upon her.

That at another session she was brought to the bar,

and pleaded that she was not guilty,

Actions on the Case.

And acquitted by the jury.

mitted herself upon her country, whether she was guilty or innocent thereof; and therefore immediately a jury thereof came before her said Majesty's justices last named, and others their said companions, into the same court; and the jurors of the said jury for that purpose impanelled by the said sheriffs, (*that is to say*) *Andrew Jublett, Jeremiah Richardson, Benjamin Jordan, Thomas Bodwell, John Young, Samuel Hilliard, John Bradhurst, Joseph Bradburn, Jonathan Garrett, Joseph Clifton, John Moss, and William Dell*, being summoned came; who being chosen, tried, and sworn to declare the truth of and concerning the premises, upon their oaths said, that the said *Hannah Williams* was not guilty of the felony specified in the said indictment charged upon the said *Hannah*, as the said *Hannah Williams* had as above alledged in her defence, nor on that occasion had the said *Hannah* ever withdrawn herself; therefore it was considered by the said court, that the said *Hannah Williams* should from thence be discharged of the said felony laid to her charge in the above mentioned indictment. By reason of which premises, they the said *Richard* and *Hannah* were obliged to expend and lay out divers great sums of money, to obtain the said *Hannah's* enlargement from her said imprisonment, and for the said *Hannah* to acquit herself from the said felony as above charged upon her; and the said *Hannah* was thereby much damified, and in danger of losing her life. Whereupon the said *Richard Williams*, and *Hannah* his wife declare, that they are injured and endamaged to the value of 200*l.* and therefore they bring this suit, *and so forth.*

WHARTON against CAREIRON.

A declaration upon a foreign bill of exchange against the acceptor. Lilly 90.

Middlesex. ——— *David Careiron* late of *London* merchant, and *D. M.* late of *London* merchant, were attached to answer Sir *Michael Wharton* knight, in a plea of trespass upon the case; and whereupon the said Sir *Michael*, by *A. B.* his attorney complains, that whereas one *Alexander Crommeline* (being a merchant, and a person trading and using commerce on the 18th day of *July* new stile, being the seventh day of the same month *July*, *English* stile, in the year of our Lord 1702, at *Hamburgh*, (*that is to say*) in *London* aforesaid, in the parish of *St. Mary le Bow*, in the ward of *Cheap*.) according to the usage and custom of merchants, then and there made a certain bill of exchange (subscribed with the hand writing of the * said *Alexander*) directed to the said *David* and *David* at *London* aforesaid; and thereby required the said *David* and *David*, at two usances and a half of an usance, to pay that his first exchange,

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change, or to the order of *Lewis Mangin*, the sum of 100l. sterling, value received, and place it to account, as by advice; which said bill of exchange afterwards, and before the end of the two usances and a half, (*that is to say*) on the 18th day of *July, English* stile, in the said year of our Lord 1702, at *London* aforesaid, in the said parish and ward, was shewn to the said *David* and *David*, for their acceptance thereof; and the said *David* and *David*, then and there, according to the usage and custom of merchants, did accept the said bill of exchange, and afterwards, (*that is to say*) the 19th day of *July*, in the year last mentioned, at the parish and ward aforesaid, the said *Lewis Mangin* by his indorsement made upon that bill of exchange, according to the usage and custom of merchants, ordered the said sum of 100l. to be paid to one *Philip Wilkinson, Sen. of Hull*, or order; and afterwards, (*that is to say*) on the same day and year last mentioned, at the said parish and ward, the said *Philip*, by another indorsement made upon the same bill of exchange, subscribed with his hand writing thereto, according to the usage and custom of merchants, ordered the said sum of 100l. to be paid to the order of the said *Sir Michael*, for value received of *Robert Cooke*; of which said indorsement the said *David* and *David* afterwards, (*that is to say*) the day and place last mentioned, had notice; whereby, and by the said usage and custom of merchants, they the said *David* and *David* became liable, and obliged to pay the said sum of 100l. to the said *Sir Michael*, according to the tenor of the said bill of exchange; and being so liable, and obliged to pay the same, they the said *David* and *David*, in consideration of the premises afterwards, (*that is to say*) the same day and year last mentioned, at the said parish and ward undertook, and then and there faithfully promised to the said *Sir Michael*, that they the said *David* and *David*, would well and truly pay the said sum of 100l. to the said *Sir Michael*, according to the tenor of the said bill of exchange. And the said *Sir Michael* in fact says, that according to the usage of merchants, one usance in a bill of exchange between merchants of *Hamburgh* and *London* aforesaid, consists of one month from the date of such bill, and no more; and that half a usance consists of fifteen days, and no more, (*that is to say*) at the parish and ward aforesaid. Nevertheless the said *David* and *David*, having no regard to their promises and undertaking, made in form aforesaid, but craftily and subtilly contriving, and fraudulently intending to deceive and defraud the said *Sir Michael* in that behalf, have not, nor hath either of them paid the said sum of 100l. or any part thereof, to the said *Sir Michael*, at the end of two usances and a half, next after the making of the said bill of exchange, or at any other time since; but they, and each of them doth still refuse so to do, to the damage of the said *Sir Michael* 130l. and therefore he brings this suit, *and so forth*.

**J. H.* complains of *N. B.* being in the custody of the marshalsea, *and so forth*, for that whereas the said *N.* contriving, and subtilly the case intending

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77 W. S.

Action on

Actions on the Case.

against one
for playing
with false
dice.

intending to defraud and deceive the said *J.* and in a fraudulent and deceitful manner to get great sums of money from him the said *J.* did (*such a day, year and place*) intice, allure, and prevail upon him the said *J.* to play at dice with the said *N.* at a certain play at dice called five or nine, for divers sums of money; by which inticement and allurement of the said *N.* he the said *J.* did play with the said *N.* at dice, at the play aforesaid called five or nine, with dice truly marked and even, and did then and there deliver the same to him the said *N.* But when the dice in course happened to come to the hands of him the said *N.* to be thrown by him, he the said *N.* then and there in a crafty and subtil manner, withdrew, and made no use of the said true and even dice, so delivered him by the said *J.* but then and there in a crafty and subtil manner, made use of, and played with certain other false dice, whereby the said numbers of five or nine, by any chance would never happen; by reason of which he the said *J.* then and there in such deceitful manner, lost to the said *N.* great sums of money, in the whole amounting to forty one pounds six shillings and eight pence, of lawful money of *England*, at that play, which he the said *N.* then and there carried away, to the damage of him the said *J.* fifty pounds; and thereupon he brings this suit, *and so forth.*

In the King's Bench.

Hillary, 24 & 25 Car. 2. Roll 92.

A declara-
tion in de-
ceit for
playing
with false
dice.

Sets forth
an intice-
ment to
play.

London *P. W.* complains of *R. T.* being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself; for that whereas the said *R. T.* on the last day of *June*, in the twenty fourth year of the reign of our sovereign Lord *Charles* the second, King of *England*, *and so forth*, at *London*, in the parish of *St. Peter Cornhill*, in the ward of *Cornhill*, contriving and deceitfully intending, craftily and subtilly to deceive and defraud the said *P.* and in order unjustly and unlawfully to get and acquire divers sums of money, with false dice, and in a false play, craftily, subtilly and deceitfully procured, desired, and solicited the said *P.* on the said last day of *June*, in the said twenty fourth year at *London* aforesaid, in the said parish and ward, to play with dice, at a certain play called hazard, with the said *R.* by means of which solicitation, procurement, and desire of the said *R.* he the said *P.* then and there was prevailed upon, and

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and did play with the said *R.* for divers sums of money; and that at that same play with the said *P.* the said *R.* then and there at the said play called hazard, with false dice craftily, fraudulently, deceitfully and unlawfully acquired, obtain'd, gain'd to himself, and carried away, of and from the said *P.* seventy pieces of coined gold called Guineas, each of which pieces being lawful money and coin of this King, and of the value of twenty shillings, and also seventy pounds in other money, * of the proper monies of the said *P.* And whereas also (*that is to say*) on the same last day of *June*, in the said 24th year at *London* aforesaid, in the said parish and ward, the said *R.* was indebted to the said *P.* in the sum of one hundred and twenty pounds of lawful money of this Kingdom, for the like sum before that time received by the said *R.* to the use of the said *P.* and being so indebted afterwards, (*that is to say*) on the same last day of *June*, in the said twenty-fourth year at *London* aforesaid, in the said parish and ward, the said *R.* in consideration thereof, then and there undertook, and faithfully promised the said *P.* well and truly to pay him the said one hundred and twenty pounds, whenever after he should be thereto required. Nevertheless the said *R.* having no regard to his said promise and undertaking made in the manner as above set forth, but craftily and subtilly contriving and intending to defraud and deceive the said *P.* in this particular, hath not paid him the said one hundred and twenty pounds, or any part thereof, or in any wise made him satisfaction for the same; (although the said *R.* afterwards (*that is to say*) on the same last day of *June*, and afterwards at *London* aforesaid, in the said parish and ward was by the said *P.* thereto required) but hitherto altogether hath, and still doth refuse to pay the same, whereby the said *P.* saith he is injured and endamaged to the value of one hundred and fifty pounds, and therefore he brings this suit, and so forth.

that by such inticement he was prevailed on to play and the defendant used false dice.
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Indebitatus Assumpsit for 120l.

BIRKS against TRIPPET.

Mich the eighteenth of King *Charles* the second. *Roll* 3.

Yorkshire. Be it remembered that heretofore, (*that is to say*) in *Saund Rep.* *Easter* term last past, came before our sovereign lord the King at *Westminster*, *John Birks*, by *Emanuel Scora* his attorney, and brought his bill here into this court, against *Burrowes Trippet*, Gent one of the clerks of Sir *Robert Henley*, Knt. chief clerk to our said sovereign lord the King, assigned to inroll pleas in this court of our said sovereign lord the King, before the King himself (present here in court in his proper person) of a plea of trespass upon the case; and there are pledges for the prosecution, (*that is to say*) *John Doe* and *Richard*

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A declaration for Non performance of an award. Memorandum.
2 Keb. 126
1 Sid. 303.

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Richard Roe ; which said bill follows in these words. *Yorkshire*.
John Birks complains of *Burrowes Trippet*, Gent. one of the clerks of
Sir Robert Henley, Knt. chief clerk to our said sovereign lord the
King assigned to enroll pleas in the said court of him our said sove-
reign lord the King, before the King himself (present here in court
in his proper person) for that whereas divers quarrels, discords and
disputes had arisen, and were depending between him the said *John*
and the said *Burrowes* ; and in order to make an end and final de-
termination whereof, and of all other causes of action then depend-
ing between them, as well the said *John*, as the said *Burrowes*, on
the 14th day of *April*, in the year of our Lord 1666, at *Doncaster*
in the said county, submitted themselves to stand to the arbitration,
order and final judgment of one *Francis Barker*, indifferently elect-
ed an arbitrator between them, to arbitrate, order, and finally a-
ward, of, upon, and concerning the premises. And the said *Bur-*
rowes afterwards, (*that is to say*) on the * same day and year at
Doncaster aforesaid, in the said county, in consideration of the said
submission, and in consideration that the said *John* did then and there
faithfully promise to the said *Burrowes* to pay to the said *Burrowes*
forty pounds of lawful money of *England*, whenever after he should
be thereunto required by him the said *Burrowes*, if he the said *John*
should not perform and fulfil all and singular those things which the
said arbitrator should so arbitrate, order and finally award, on his
part to be performed and fulfilled, undertook, and then and there
faithfully promised the said *John*, that if he the said *Burrowes*
should not perform and fulfil all and singular those things which the
said arbitrator should arbitrate, order and award, on his part to be
performed and fulfilled ; that then the said *Burrowes* would well
and truly pay and satisfy to the said *John* forty pounds of law-
ful money of *England*, whenever after he should be thereunto re-
quired and the said *John* in fact declares, that the said arbitrator did
undertake the trouble of arbitrating, ordering and awarding between
them the said *John* and *Burrowes*, of and concerning the premises,
and did by his arbitration made afterwards thereon, (*that is to say*)
on the 21st day of the same month of *April*, in the said year of our
Lord 1666, at *Doncaster* aforesaid, in the said county, arbitrate
order and award between them, in manner and form following.
(*that is to say*) first that the said *Burrowes*, should pay to the said
John the sum of ten shillings, for, and in consideration of certain
damages, which the said *John* had sustained in an action of trespass
and assault ; and also twenty shillings more for the said *John's* ha-
ving kept and depastured a certain horse of the said *Burrowes* ; and
furthermore the said arbitrator did arbitrate, order and award,
that the said *Burrowes* should pay to the said *John*, another ten
shillings for the said *John's* having kept certain beasts, and for keep-
ing and applying medicines to two young *Bullocks* of the said *Bur-*
rowes, and moreover the sum of four pounds towards his the said
John

The submis-
sion,

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Mutual pro-
mises to
stand to the
award, or
pay 40l.

The award,

That the
defendant
should pay
10s.

for feeding
other Cattle.

That the
defendant
should pay
other 10s.
for feeding
other Cat-
tle.

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John Birks's lawful expences laid out about divers differences had between them ; which said sums amounting in the whole to six pounds, the said arbitrator did arbitrate, and award the said *B.* to pay to the said *J.* upon the 23d day of the same month of *April*, at the mansion-house of *Henry Jenkinson*, in the parish of *Hansworth*, in the said county of *York* ; and that upon receipt of the said six pounds, general releases under the hands and seals of them, and each of them, should be mutually given and delivered from the beginning of the world until the said 2 d day of *April*, in the said year of our Lord 1666. And also that the said *Burrowes* should deliver to the said *John* a certain fine concerning and belonging to the said *John Birks*, and one *John Marriot*, late of the parish of *Hansworth* aforesaid, in the said county. And also the said arbitrator, in order to make peace, and to determine the said disputes and differences, and out of regard to the quiet of the, said *J.* and *B.* did furthermore arbitrate, order and award, that the said *John* from the date of the said releases, should cease and desist from all further prosecution at the general sessions of the peace against the said *Burrowes*. And the said *John* in fact declares, that although the said *John* did well and faithfully perform and fulfil all and singular the premisses specified in the above award, on the part of the said *John* to be performed and fulfilled, according to the form and effect of the said award ; yet the said *John* in fact * avers, that the said *B.* hath not paid the said six pounds to the said *J. Birks* upon the said 23d day of *April*, in the said year of our Lord 1666, at, or in the said mansion-house of him the said *Henry Jenkinson*, or any where else, nor delivered the said fine to the said *John*, according to the form and effect of the said award, altho' the said *B.* afterwards, (that is to say) on the 24th day of *April*, in the said year of our Lord 1666, at *Doncaster* aforesaid, was thereto required. And the said *John* further avers, that after the making of the said award, and before the exhibiting of the bill of the said *John* against the said *Burrowes*, (that is to say) on the twenty-eighth day of *March*, in the said year of our Lord 1666, at *Doncaster* aforesaid in the said county of *York*, he the said *John* requested the said *Burrowes*, to pay to him the said *John* the said sum of forty pounds according to his said promise and undertaking made as above, (the said *Burrowes* not having perform'd and fulfilled the matter specified in the said award on his part to have been perform'd,) but he the said *Burrowes* then and there refused so to do. Nevertheless the said *Burrowes*, having no regard to his said promise and undertaking, made in the manner as above, but contriving, and fraudulently intending in that behalf, craftily and subtilly to deceive and defraud him the said *J. Birks* of the said forty pounds, hath not yet paid the same to the said *John* according to his said promise and undertaking, nor hath hitherto made the said *John* any satisfaction for the same ; whereupon the said *John* declares, that he is injured and endamaged to the

And 41. for the plaintiff's expenses.

That upon the payment thereof of mutual Releases should be given.

And that the defendant should deliver the plaintiff a Fine.

That the plaintiff should desist from prosecuting the defendant at the sessions.

P * 167.

The breach

Actions on the Case.

the value of one hundred pounds ; and therefore he brings this suit, *and so forth.*

Imparlanee. And now at this day, (*that is to say*) on *Tuesday* next after three weeks from *St. Michael*, this same term, (to which day the said *Burrowes* hadleave to imparl to the said bill and then to answer and soforth,) came as well the said *J.* by his said attorney, as the said *B.* in his proper person, before our said sovereign Lord the King at *Westminster* ; and the said *B.* defends the force and injury,

Special plea and damages, and whatever else he ought to defend, when and where this court will consider thereof ; and saith, that the said *J. Birks* ought not to have or maintain his said action thereon against him, because he saith that 'ris very true, that he the said *B.* and the said *J. B.* did submit themselves to stand to the award, order, and final judgment of the said *Francis Barker* an arbitrator, between them indifferently elected to arbitrate, order, and finally award of and concerning the premisses ; and that he the said *B.* thereupon undertook to perform and fulfil all and every thing, which the said arbitrator should adjudge and award on the part of him the said *B.* to be performed and fulfilled, as the said *John* doth above alledge ; but the said *B.* further pleads in his defence, that after the making of the said submission, and also after the said promise and undertaking of him the said *B.* and before that the said arbitrator made any award, or final judgment, between him the said *B.* and the said *J. B.* (*that is to say*) on the 20th day of *April*, in the said year of our Lord 1666, at *Doncaster* aforesaid, in the said County of *York*, the said *John* was indebted to the said *B.* in four pounds of lawful money of *England*, as well for fees by him the said *J.* to the said *B.* as attorney of and for him the said *J.* before, and at that time due, owing and unpaid ; as for divers sums of money before that time expended and laid out by the said *B.* for the said *J.* at * his instance and request, which said debt of four pounds, due and owing to the said *B.* by the said *J.* so as aforesaid, the said arbitrator afterwards, (*that is to say*) the same day and year last above-mentioned at *Doncaster* aforesaid, had notice. And the said *B.* then and there made appear to the said arbitrator, that the said four pounds were justly owing to the said *B.* and ought to have been paid by the said *J.* and then and there he the said *B.* requested the said arbitrator to make an allowance for the same to the said *B.* by the final award of the said arbitrator, between him the said *B.* and the said *J.* And the said *B.* furthermore pleads in his defence, that the said arbitrator afterwards, (*that is to say*) on the said 21st day of *April*, in the said year of our Lord, at *Doncaster* aforesaid, made his said award between him the said *B.* and the said *J.* without taking into his consideration, or making any allowance to the said *B.* for his said debt of four pounds, due, owing and unpaid to the said *B.* by the said *J.* as aforesaid, notwithstanding proof thereof had been there given and made to the said arbitrator by the said

Confessing the award.

And the mutual promises.

But that before the making the award, the plaintiff was indebted to the defendant in other
P* 168
sums of money.

But that he made the award without having any confide

P. fo

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B. so as aforesaid. And this the said *B.* is ready to verify : Wherefore he prays judgment, whether the said *J.* ought to have or maintain his said action upon the said written award, made in the manner and form aforesaid, against him the said *B.* and so forth. deration of
the defend-
ant's said
debt.

There was a Demurrer to this plea, and a joinder in Demurrer ; and Saunders of counsel with the Defendant, did not insist upon the sufficiency of his Plea as a Bar, but laid perdue, and took a material exception to the Declaration, which was for want of what I have here above inserted in Italick to make it good ; for as this promise to pay the 40l. was collateral to the Award, and not a duty arising therefrom, and to be paid upon Request, a Request is therefore necessary to be set forth ; but if it had been a Duty arising out of the Award, then the bringing the Action is a sufficient Request ; and to warrant this to be law, are the several cases following. 1 Keb. 927. 2 Keb. 10, 126. 1 Lev. 48, 289. 2 Lev. 198. 3 Lev. 363, 366.

And Cases to warrant that not to be a good plea, are the cases following. 1 Roll's Abr. 257. 2 Mod. 309. 3 Mod. 264. 1 Salk. 72, 74. 2 Saund. 190, 293, 337. 1 Saund. 326.

*Suffex. A. B. and C. D. complain of E. F. being in the custody of the marshal of the Marshalsea of our sovereign Lord the King, before the King himself ; for that whereas (such a Day, Year and Place) in the county aforesaid, a certain discourse was had and arose between the said A. B. and C. D. and the said E. F. concerning seven quarters of barley, to be carried by the said A. B. and C. D. in a waggon, drawn by a team of three horses, and two mares, from the bottom of Littleton-Hill in Waltham, in the said county of Suffex, unto the top of the same hill, before the first day of May, commonly called May Day, then next following ; upon which said discourse then and there, (that is to say) the said (such a Day, Year and Place) in the County aforesaid, in consideration that the said A. and C. for, and in consideration of two shillings and six pence of lawful money of England, in hand paid and deliver'd to them by the said E. F. at that time, had then and there undertaken, and faithfully promised the said E. F. that they the * said A. and C. would carry the said seven quarters of barley, in a waggon drawn by a team of three horses and two mares, from the bottom of the said Littleton-Hill in Waltham aforesaid, unto the top of the same hill before the first day of May, commonly called May Day then next following ; or otherwise they the said A. and C. undertook, and faithfully promised the said E. F. that they would pay to the said E. F. eight pounds of lawful money of Great-Britain, he the said E. did then and there undertake, and then and there faithfully promised the said A. and C. that if they the said A. and C. should carry the said seven quarters of barley in a waggon, drawn by a team of three horses and two mares, from the bottom of the said Littleton-Hill in W. aforesaid, unto the top of the same hill before the first day of May*

In case up-
on a pro-
mise to pay
money up-
on a wager.

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May, commonly called *May Day* then next following ; that then he the said *E. F.* over and above the said two shillings and six pence, in hand paid and deliver'd to them the said *A.* and *C.* by the said *E. F.* as aforesaid, would well and truly pay to the said *A.* and *C.* as much more money, as together with the said two shillings and six pence, should make the sum of ten pounds of lawful money of *Great-Britain* ; and the said *A.* and *C.* in fact say, that they the said *A.* and *C.* afterwards, and before the said first day of *May*, (*that is to say*) (*such a Day and Year*) did carry seven quarters of barley in a waggon, drawn by a team of three horses and two mares, from the top of the said *Littleton Hill* in *Waltham* aforesaid ; and that they the said *A.* and *C.* afterwards, (*that is to say*) *such a Day, Year and Place* gave Notice thereof to the said *E. F.* and then and there requested the said *E. F.* to pay to them the said *A.* and *C.* nine pounds seventeen shillings and six pence, of lawful money of *Great-Britain* ; being so much money, as together with the said two shillings and six pence, in hand paid and delivered to the said *A.* and *C.* as aforesaid, made and amounted to the said sum of ten pounds, according to the said promise and undertaking of him the said *E. F.* Nevertheless the said *E. F.* not regarding his said promise and undertaking, but contriving, and fraudulently intending in that behalf, craftily and subtilly to deceive and defraud the said *A.* and *C.* hath not paid the said sum of nine pounds seventeen shillings and six pence to the said *A.* and *C.* or either of them, although he the said *E.* was by them the said *A.* and *B.* afterwards, (*that is to say*) *such a day year and place,*) and often afterwards requested thereto according to his said promise and undertaking, nor in any manner hitherto made the said *A.* and *C.* or either of them satisfaction for the same, whereby they the said *A.* and *C.* say they are injured and endamaged to the value of twenty pounds ; and therefore they bring this suit, and so forth.

Action upon the case for an annoyance by the defendant being a shoemaker, in conveying his smell by his Oils and other excrements, out of his house by a gutter by him made to the house and shop of the plaintiff being a bar-

Somersetshire. *A. B.* by *G. T.* his attorney complains against *C.* *D.* being in the custody of the marshal of the *Marshalsea*, of our sovereign Lord the King, before the King himself ; for that where as the said *A.* is, and for a long time hath been seized of and in a messuage, and barber's shop, with the appurtenances in *P.* in the county aforesaid, parcel of that messuage, and of and in a yard near adjoining to the said messuage, and of and in a garden near adjoining to the said yard, with the appurtenances in *P.* aforesaid in his demesne as of fee. And also whereas the said *C.* on and from the first day of *October*, in the sixth year of the reign of his present Majesty *George* the Second, King of *Great-Britain*, and so forth, did, and always afterwards, until the day of his the said *A.*'s exhibiting his said bill, hath occupied and possess'd a house and shoemaker's shop and a working-house, with the appurtenances in *P.* aforesaid, near adjoining to the said messuage, yard and garden of the said *A.* on the south-side thereof. And the said *C.* on the said first day of *October*,

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tober, in the said year was, and ever since hath been, and now is a Cordwainer, and during the said whole time, us'd several kinds of oils, in and about his said art and mystery of a Cordwainer, and the said *C.* endeavouring, and maliciously intending to endamage, and prejudice the said *A.* and wholly to deprive and hinder him of the use, profit and benefit of the messuage, barber's shop, yard and garden aforesaid, on the first day of *October*, in the said year at *B.* aforesaid, newly made a certain sink in the working-house of the said *C.* coming from the said working house, into the yard of the said *A.* and continued the same from the said first day of *October*, to the day of exhibiting the bill of the said *A.* to the intent that the oils daily used, and to be used by him the said *C.* in his said working-house, and other filthiness pour'd and cast forth out of the said working house of the said *C.* might run into the said yard of the said *A.* and from thence be convey'd into his said garden. And the said *C.* on the said first day of *October*, and from time to time, during the whole time aforesaid, cast forth dung, excrements filthiness, and noisome oils, and other corruptions out of the working-house of the said *C.* in great abundance and quantity; so that by making of the said gutter, and pouring therein the said stinking oils and other filthiness, the same from time to time during the said time, ran out of the said working-house of the said *C.* into the said yard of the said *A.* and from the same yard of the said *A.* into his said garden; and the said stinking oils and other filthiness, during the time aforesaid, so running and coming into the yard and garden of the said *A.* was very noisome, and did great hurt and prejudice to his said garden. And by reason of the said gutter and sink made as above, and pouring therein the said stinking oils and other filthiness, he the said *A.* hath not only lost the whole profit and commodity of his said yard and garden, during the whole time aforesaid, but hath also thereby lost the use and profit of his said trade of a Barber, during the whole time aforesaid; for that his customers, by means of the said sink and gutter, and the oils and filthiness poured and cast therein, refused to come to his said shop, to the damage of the said *A.* forty pounds, and therefore he brings this suit, *and so forth.*

This Case was adjudg'd in *Gouldsbrough* for the Plaintiff.

Norfolk. *Francis Reeder*, late of *Pulham St. Mary*, in the county *A* declar- aforesaid, Carpenter, was attach'd to answer to *Ely Phillips*, in making a steeping fat (for the making of Soap) in an action of trespass upon the case, *and so forth*, and whereupon the said *Ely* by *Henry Clift* his attorney complains, that whereas on the 28th day of *October*, in the 4th year of the reign of his present Majesty, at *Tasburgh*, a certain discourse arose and was had between them the said *Ely* and *Francis*, concerning the art and mystery of making pot ashes, which the said *Ely* at that time did, and for a long time before had, and still doth use and exercise, and of and concerning a new vessel called a steeping fat, (being a vessel pursuant to useful agreement.

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useful and necessary, in and about the said business of making pot-ashes to be made by the said Francis, for and to be used by him the said Ely; and upon that discourse, the said Francis then and there (*that is to say*) on the same 28th day of October, in the said year abovesaid, at *Tasburgh* abovesaid, in consideration that the said Ely, at the special instance and request of the said Francis, then and there undertook, and faithfully promised to pay him the said Francis 90s. of lawful money of England, for such vessel called a steeping vat, upon delivery thereof, undertook, and then and there faithfully, promised the said Ely, that he the said Francis would firmly, artificially, and in a workman-like manner, make and finish such vessel, or steeping vat, of good, well seasoned, and the best plain oak, and all other things necessary thereto, so that the said vessel should contain all liquors used in the art of making pot-ashes to be put therein, without the running out, or leaking of such liquor, through any part of the said vessel, and would well and truly deliver to the said Ely, the same vessel so made and finished, within one week, next after the making of the said promise and undertaking by the said Francis, as above set forth. Nevertheless the said Francis having no regard to his said promise and undertaking, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said Ely in this particular, hath not made, or delivered to the said Ely, any such vessel, as he ought to have done, according to his said promise and undertaking, altho' he had been often thereto required; but instead thereof, contrary to his said promise and undertaking, hath omitted, and totally neglected to make and deliver such vessel, as abovesaid. And whereas the said Francis on the 5th day of November, in the said 4th year, at *Tasburgh* abovesaid, had bargained with the said Ely, for him the said Francis to make in a good and workman-like manner, with good English oak, a certain other vessel called a steeping vat, fit for the making pot-ashes, for the sum of ninety shillings, to be paid for the same by the said Ely; and the said Francis instead thereof, made the said vessel last above mentioned, in so negligent, improvident, and unworkman-like manner, that the said Ely could not make any pot-ashes in the same, and was therefore totally retarded and hindered from the use of his trade or mystery in making pot-ashes for a long time (*that is to say*) from the 12th day of November, in the 4th year, until the 1st day of April next following, to the damage of the said Ely 50l. and thereupon he brings this suit, and so forth.

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*WHETHERALD against CLARKSON.

Michaelmas the 12th of King William the Third. Roll. 1870.

York. James Clarkson late of *Askrigg*, in the said county, was attached to answer to *Margaret Whetherald*, in an action of trespass for scanda- upon the case, and thereupon she the said *Margaret*, by J. L. her lous words attorney complains, that whereas she the said *Margaret* now is a good

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good, true, and faithful subject of our sovereign Lord the King spoken of and from the time of her nativity hitherto hath been, a chaste and a virgin, honest virgin, never known by any man whatsoever; and hath been whereby accounted, esteemed, and reputed amongst good honest, and prudent men, as well her neighbours, as others, subjects of our said sovereign Lord the King, to be of a good name, character, honest she lost her marriage. Lut. 1296. N. L. 411. 12 Mod. 597. Being a person of good character and circumstances.

behaviour and conversation, and hath all her life-time hitherto lived, and continued untouched and unsuspected, of the atrocious crimes of perjury, fornication, or incontinency, or either of them, or any such like enormous crimes, and by means thereof several young men of good name and character, have at several times desired to take the said *Margaret* to be their wife, and in particular one *A. B.* of *Colchester*, in the county of *Essex* clothier, before the speaking and publishing the said false and scandalous words hereafter mentioned to and of the said *Margaret*, (*that is to say*) on the first day of *April*, in the twelfth year of his present Majesty's reign, at *Ashrigg* aforesaid, with great fervency, and protestations of love and sincerity, solicited the said *Margaret* to consent to be his wife: Nevertheless the said *James*, of his meer wicked malice had, against the said *Margaret*, contriving and maliciously intending not only to injure and detract her, in her good name, character and reputation, and to bring her into infamy and disgrace, and as much as in him lay, to deprive her of her marriage, but also to subject her to undergo the penalties and punishments, that are provided by the laws of this kingdom, for persons guilty of perjury, on the 2d day of *June*, in the 12th year of the reign of his present Majesty's at *Ashrigg* aforesaid, in the presence and hearing of several of his Majesty's subjects, loudly and publicly spoke to, repeated, pronounced, and published of the said *Margaret* (then and yet being a sole unmarried, pure, chaste, and honest virgin) these false, scandalous, opprobrious, and lying words following, *you* (meaning the said *Margaret*) *are a whore, and a forsworn jade, and I* (meaning the said *James*) *will prove you one*; by means of speaking, repeating, proclaiming and publishing of which false, scandalous and opprobrious words, she the said *Margaret* fell into great infamy and scandal with several worthy persons, subjects to our sovereign Lord the King, with whom the said *Margaret* was before that time in great favour and esteem; and also thereby many young men, who before, had solicited her in marriage, afterwards neglected and refused so to do; and in particular the said *A. B.* of great credit and reputation, who before the said time of speaking the said scandalous words, had with great fervency and love, solicited the said *Margaret* to be joined in matrimony with him, for the reason above, altogether refused and despised the company and conversation of the said *Margaret*, and always afterwards hitherto hath, and still doth refuse to be married to the said *Margaret*; whereby the said *Margaret*.

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garet

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garet hath not only lost, and been deprived of her credit and reputation, but hath also lost her preferment by marriage, and is thereby otherwise greatly injured in doing her lawful and honest affairs, to the damage of the said *Margaret* 300*l.* and therefore she brings this suit, *and so forth.*

Note ; In *Lut.* 1296, it was adjudged that the declaration there was ill, because it was not said with whom the plaintiff lost her marriage ; therefore you may perceive I have altered the precedent.

For not repairing of a messuage, &c. pursuant to promise.

Whereas the said *A.* on the 10th day of *August*, in the sixth year of the reign of his present Majesty, was seized of and in one messuage, called or known by the name of the *Lamb*, with the appurtenances in *M.* in the said county, in his demesne as of fee ; and being so seized thereof, a certain discourse was had and arose between the said *B.* and *A.* of and concerning a demise of the same, to be made to the said *B.* by the said *A.* upon which said discourse the said *A.* the same day and year at *M.* aforesaid, in consideration, that he the said *B.* at the special instance and request of the said *A.* would accept of a lease from the said *A.* of the said messuage, for the term of fourteen years, under the yearly rent of twenty pounds, of lawful money of *Great Britain*, to be paid yearly during the said term to the said *A.* by the said *B.* at the feasts of the annunciation of the Blessed Virgin Mary, and St. Michael the Archangel, by equal portions, he the said *A.* undertook, and then and there faithfully promised the said *B.* that he the said *A.* would well and sufficiently repair the said messuage, with the appurtenances then being in decay and out of repair, within eight months then next following, at his own proper costs and charges ; and although the said *A.* afterwards, (*that is to say*) on the 20th day of *August*, in the said year, at *M.* aforesaid, demised the said messuage, with the appurtenances to the said *B.* for the term of fourteen years, under the yearly rent of twenty pounds of lawful money of *Great Britain*, to be paid by the said *B.* to the said *A.* yearly during the said term, at the said feasts, by equal portions ; of which said demise the said *B.* accepted and held, and occupied the said messuage, with its appurtenances, for a year and half then next following, by virtue of the said demise ; and although the said *B.* at the said several feasts, paid the said *A.* the said sum of 30*l.* for rent for the time aforesaid, pursuant to his said agreement : Nevertheless the said *A.* having no regard to his said promise and undertaking, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud him the said *B.* in this particular, within eight months then next following, did not repair the said messuage, which at the time of the said promise and undertaking was decayed, and out of repair, (*that is to say*) in the roof of the said messuage, for want of tiling, whereby the timber, by the tempests of rain descending upon it, became putrid, and corrupt, &c. also in the windows of the

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the said messuage, for want of glafs, with the appurtenances, according to his said promise and undertaking, but hitherto hath, and still doth refuse to repair the same, to the damage of the said B. fifty pounds; and thereupon he brings his suit, *and so forth.*

•BENSON against MUSGROVE.

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Trinity the Second of King James the Second. Roll 1652.

Cumberland. Richard Musgrove, late of Hayton Castle in the Lut. 71, 72. said county, baronet, the late sheriff of the said county of Cum- N. L. 28. berland, was attached to answer to John Benson, gent. in an action of trespass upon the case; and whereupon the said John, by Francis Catterson his attorney complains, that whereas the said John, in the term of St. Hillary, in the first year of the reign of our sovereign Lord the King, duly prosecuted out of his Majesty's court of common pleas at Westminster, in the county of Middlesex, his Majesty's writ of *capias*, or for taking the body of a defendant, to answer to the plaintiff's suing out the same, against Ralph Hayes of Egremont, in the said county of Cumberland, Yeoman, directed to the said sheriff of the said county of Cumberland, by which said writ, our said sovereign Lord the King commanded the then sheriff of the said county of Cumberland, that he should take the said Ralph, if he could be found in his bailiwick, and safely keep him, so that he might have his body before his Majesty's justices at Westminster, on the morrow of the assension of our Lord, to answer to the said John Benson in an action, wherefore he had broke the close of the said John at Penrith with force and arms, and brought other injuries on him, to the great damage of the said John, and against the peace of our sovereign Lord the King; and also to answer to the said John, according to the custom of the said court of common pleas, in an action for a debt upon a demand of 33l. which said writ of our said sovereign Lord the King, sued out in the manner as above, afterwards, (*that is to say*) on the 13th day of April, in the said first year at Cockermouth, he the said John delivered to the said Richard (he then being the sheriff of the county of Cumberland) to be executed in due form of law, by virtue of which said writ, afterwards, and before the return of the same, (*that is to say*) on the 16th day of April, in the said first year, he the said Richard took and arrested the said Ralph, being found in his bailiwick, (*that is to say*) at Cockermouth aforesaid, and then and there had the said Ralph in his custody by virtue of the said writ. Nevertheless the said Richard having no regard to the duty of his office of sheriff, but contriving, and fraudulently intending, unjustly

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justly to grieve the said *John* in this particular, or at least to give him great delay in his suit, afterwards, and before the return of the said writ, (*that is to say*) on the 20th day of *April*, in the said first year, permitted the said *Ralph*, being detained for the reasons above, to escape out of the custody of the said *Richard* then sheriff of the said county of *Cumberland* without the leave, and against the will of the said *John*, and to go at large, where-ever he would, (*that is to say*) at *Cockermouth* aforesaid; he the said *John*, not having had any satisfaction for his said debt of 33*l.* whereby the said *John* is manifestly delayed and deprived of his proper remedy, for recovering and obtaining his said debt, and is very likely to lose the same, to the damage of the said *John* 40*l.* and therefore he brings this suit.

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*STANTON against JAMES.

An action
upon the
case for an
escape of
one taken
upon a ca-
pias utlag-
atum before
judgment.
Lut. 108.
N. L. 39.

London. Cane *James*, late of the parish of *St. Giles* in the fields, in the county of *Middlesex*, baronet, late sheriff of the county of *Essex*, was attached to answer to *Stephen Stanton*, gent. who sues in this case, as well for our sovereign Lord the King, as for himself in an action of trespass on the case and so forth; and whereupon the said *Stephen* who sues in this case, as well for our sovereign Lord the King as for himself, by *John Wade* his attorney, complains, that whereas the said *Stephen*, in the term of *St. Michael*, in the 5th year of the reign of his present Majesty, impleaded one *Thomas Nightingale*, baronet, in his Majesty's court of common pleas, before his Majesty's justices of the same court, at *Westminster*, in the county of *Middlesex*, in an action, that he should render to the said *Stephen* two hundred pounds, which he then owed to, and unjustly detained from him as he asserted; and the said *Thomas*, in as much as he did not come into the said court, before his said Majesty's justices, to answer to the said *Stephen*, according to the law and customs of this Kingdom of *Great Britain*, had been put in exigent to be outlawed; and afterwards (*that is to say*) on *Monday* next after the feast of *St. Mark the Evangelist*, in the sixth year of the reign of his present Majesty, was outlawed in *London*, as by the record and proceedings thereof, now remaining in his Majesty's court of common pleas at *Westminster*, more plainly may appear. And whereas also afterwards, (*that is to say*) on the 12th day of *February*, in the said sixth year of the reign of his present Majesty, for a more speedy recovery of the said debt, the said *Stephen* who sues in this case, as well for
our

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our sovereign Lord the King, as for himself, sued and prosecuted out of his said Majesty's court of common pleas, his Majesty's writ of *Capias utlagatum*, or for taking the body of persons outlawed, against the said *Thomas*, directed to the then sheriff of the county of *Essex*, whereby our said sovereign Lord the King commanded the said sheriff of *Essex*, that he should not omit, by reason of any liberty in his county, but that he should enter therein, and take the said *Thomas* outlawed in *London*, on the *Monday* after the feast of *St. Mark* the *Evangelist*, in the fifth year of the reign of his present Majesty, at the suit of the said *Stephen* in an action of debt, if he could have been found in his bailiwick; and that he should safely keep him, so that he might have his body here within fifteen days from the day of the feast of *Easter* then next following, to do and receive that which the court of our said sovereign Lord the King should consider of in that particular; and that he should have there the writ; which said writ, he the said *Stephen* who sues in this case, as well for our sovereign Lord the King as for himself, afterward and before the return of the same, (*that is to say*) on the 12^{ty} day of *April*, in the said fifth year at *Chelmsford*, in the said county of *Essex*, delivered to the said *Cane James*, (he then being the sheriff of the said county) to be executed in due form of law; and the said *Cane James*, afterwards, (*that is to say*) on the same 12th day of *April*, in the said fifth year, he the said *Cane* *then being the sheriff of the said county of *Essex*, took the said *Thomas Nightingale* at *Chelmsford* in the said county, by virtue of the said writ directed to the said *Cane James* then sheriff of the said county aforesaid, and then and there had the said *Thomas* in his custody. Nevertheless the said *Cane James* being sheriff of the said county of *Essex*, paying no manner of regard to the duty of his said office of sheriff, but contriving, not only to deceive and defraud our said sovereign Lord the King, of what belonged to him, by reason of the said outlawry, but also to delay the said *Stephen*, who sues in this case, as well for our sovereign Lord the King as for himself, in prosecuting the said suit, afterwards, (*that is to say*) on the 20th day of *April* in the said fifth year, without any precept from our sovereign Lord the King, and without the leave, and against the will of the said *Stephen*, permitted the said *Thomas* being outlawed and detained in his custody in the manner as above, to escape out of the county of him the said *Cane*, then sheriff of the said county of *Essex*, and go at large where-ever he pleased, (our said sovereign Lord the King not having had any satisfaction for what belonged to him; and the said *Stephen* not having had any satisfaction for his said debt, or any wise precluded therefrom, by any judgment of the said court) in contempt of our said sovereign Lord the King, and to the derision of the said court, and to the great damage and injury of the said *Stephen*, in manifestly delaying and hindering him in prosecuting the said suit; and the said *Thomas* is now not to be found, but lurks and wanders up and down in places unknown to the

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the said *Stephen*, and cannot be taken or arrested, to the damage of the said *Stephen* three hundred pounds ; and therefore he brings this suit, *and so forth.*

Note ; this precedent was taken from *Lut.* 109. the title of which is *Cook Pascha* the third of King *James* the second, *Roll* 361. and there the plaintiff sets forth the nature of his debt upon which he outlawed the defendant, that it was upon a bond, which being said by *Lut.* to be needless, and several cases were there cited by him, which proved it so to be ; therefore I have here omitted it ; and in that precedent, the plaintiff in reciting the outlawry, had not said as appears by the record, &c. and a multitude of precedents being in that manner, I have, as you may perceive, made this precedent so.

Hob. 9
Brownl.
Red. 218.
Lib. plac. 8.
Form. ben.
plac. 19.
Herne. 3,
& 4.

WHITROW against EDWIN and others.

1 *Lut.* 128.
N. *Lut.* 47.

Trinity the Third of King *William* and Queen *Mary.*

Middlesex. Sir *Humphry Edwin*, late of *London*, knight and Sir *John Fleet*, late of *London* knight, late sheriff of the county of *Middlesex*, was attached to answer to *John Whitrow*, merchant, in an action of *trespass upon the case* ; and thereupon *J. W.* by *N. R.* his attorney complains, that whereas one *Edward Thynn* a merchant, and *James Thynn* a merchant, in the life-time of the said *Edward*, (that is to say) on the first day of *May* in the year of our Lord 1689, stated an account together with the said *John W.* of divers sums of money before that time due and unpaid by the said *E.* and *J.* to the said *John* ; and upon the stating of the said account, the said *E.* and *J.* were found to be in arrear to the said *John*, in 2602l. 18s. 6d. of *Spanish* money, amounting at that time to 581l. 1s. 6d. of lawful money of *England*, (which must now be said of lawful Money of Great Britain) and being so found in arrear he the said *E.* afterwards, (that is to say) on the day and year aforesaid, died at the parish of *St. Andrew Holbourn*, in the county aforesaid ; and the said *James* survived him, (the said 581l. 1s. 6d. not having been paid to the said *J. W.*) and the said *J. W.* in order to recover the said 581l. 1s. 6d. afterwards, (that is to say.) in the first year of the reign of our sovereign Lord and Lady the King and Queen, prosecuted their majesty's said writ of *Capias*, out of their majesty's court of common pleas, against the said *James Thynn*, directed to the then sheriff of the city of *Exeter*, by which said writ, the said sovereign Lord and Lady the King and Queen, commanded

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manded the said sheriff of the city of *Exeter*, that he should take the said *James Thynn*, by the name of *James Thynn*, late of *Hackney*, in the county of *Middlesex*, Merchant, if he could be found in his bailiwick, and that he should safely keep him, so that the said sheriff might have his body before their majesties justices at *Westminster*, in three weeks from the day of the *Holy Trinity* then next following, to answer to the said *J. W.* in an action, wherefore with force and arms he had broke the close of the said *J. W.* at the said city of *Exeter*, and had done him other wrongs to the great damage of the said *J. W.* and against the peace of our said sovereign Lord and Lady the King and Queen; and also that the said *James* should answer to the said *J. W.* according to the custom of their Majesties court of common pleas, in a certain action of trespass upon the case, upon a promise unperformed, to the damage of the said *J. W.* 500l. and that he should have there that same writ; at which day the then sheriff of *Exeter*, (*that is to say*) *Edward Searward*, Esq; made a return thereon to their said Majesties Justices, that the said *James* was not to be found in his Bailiwick; whereupon it was sufficiently testified in the said court of our said sovereign Lord and Lady the King and Queen, that the said *James* was lurking and wandering up and down in the county of *Middlesex*; and therefore the said *J. W.* on the 19th day of *June* in the said first year, prosecuted out of their said Majesties Court of common pleas their said Majesties writ of *Capias*, against the said *James Thynn*, directed to the then sheriff of the county of *Middlesex*; by which said writ, our said sovereign Lord and Lady the King and Queen commanded the said sheriff of the said county of *Middlesex*, that he should take the said *J. T.* by the name of *J. T.* late of *Hackney*, in the county of *Middlesex*, merchant, if he could be found in his bailiwick, and safely keep him, so that the said sheriff might have his body before their Majesties justices at *Westminster*, in three weeks, from the day of the *Holy Trinity*, then next following, to answer to the said *J. W.* in an action, wherefore with force and arms he had broken the close of the said *J. W.* at *Exeter*, and done him other wrongs, to the damage of the said *J. W.* and against the peace of our said sovereign Lord and Lady the King and Queen; and also, that the said *James* should answer to the said *J. W.* according to the custom of their majesties court of * common pleas, in an action of trespass upon the case, on a promise unperform'd, to the damage of the said *J. W.* 500l. and whereupon the said sheriff of the said city of *Exeter*, had made a return to their said Majesties justices, in three weeks from the day of the *Holy Trinity* then last past, that the said *James* was not to be found in his bailiwick; whereas it was sufficiently testified in the said court of our said sovereign Lord and Lady, the King and Queen, that the said *James* was lurking and wandering up and down in the said county of *Middlesex*; which said writ, directed to the said sheriff of the said county

Recital of
the writ of
Capias.

The return.

Recital of a
testatum to
the sheriff
of *Middlesex*.

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of

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of *Middlesex*, afterwards, (*that is to say*) on the 20th day of *August* in the said first year, was delivered to the said *Humphrey*, and to *John Fleet*, then being the sheriff of the said county of *Middlesex*, at the said parish of *St. Andrew Holbourn*, to be executed in due form of law, by virtue of which said writ, the said *Humphrey* and *John Fleet*, then being the sheriff of the said county of *Middlesex*, afterwards, and before the return of the said writ, (*that is to say*) on the 23d day of *August*, in the said first year, took the said *James* at the said parish of *St. Andrew Holbourn*, and arrested him, and had and detain'd him in their custody, for the reason above-mentioned, for the space of two days and upwards: Nevertheless the said *Humphrey* and *John Fleet*, (*then being the Sheriff of the said County of Middlesex*,) paying no regard to the duty of their said office of sheriff, and to the oath they had taken for the due execution of the same but contriving; and fraudulently intending to deceive and defraud the said *J. W.* of the said sums of money, and of the benefit and advantage of his said suit, afterwards, (*that is to say*) on the 27th day of *August*, in the said first year, permitted the said *James* (*so being in their Custody, in the manner and for the reasons above*) to go whither he would, and escape out of their custody, without any precept of our said sovereign Lord and Lady the King and Queen, and without the consent, and against the will of the said *J. W.* (*that is to say*) at the said parish of *St. Andrew Holbourn* (*the said sum of 581l. 1s. 6d. remaining unpaid to the said J. W.*) and that the said *James* hath ever since absconded, and withdrawn himself to places altogether unknown to the said *J. W.* so that the said *James* could not be retaken by any of their majesties process; and therefore the said *J. W.* hath not only lost, and been deprived of the said 581l. 1s. 6d. but also of all the benefit and advantage of his said suit, to the damage of the said *J. W.* 500l. and therefore he brings this suit *and so forth*.

Sets forth
the escape.

Proper by
an admini-
strator.
This prece-
dent is ta-
ken from 2
Saund. 138
only alter'd
mutatis
mutandis,
to bring it
down to
his present
P* 179
majesty's
reign.

Essex *Alexander Davis*, administrator of all and singular the goods and chattles, rights and credits of *Edmund Spicer* lately deceased, complains of *Edward Turner*, being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, for this cause, (*that is to say*) that whereas the said *Edmund* in his life-time, (*that is to say*) on the first day of *July*, in the 6th year of the reign of our sovereign Lord, *George the second King of Great-Britain*, and so forth, at the parish of *Barking*, in the said county of *Essex*, was possess'd of one bed, one bedstead, (*so reciting the Goods*) of the value of 50l. as of his own proper goods and chattles, and being so possess'd thereof, afterwards, (*that is to say*) on the said first day *July*, in the said * sixth year, the said *Edmund* died at *Barking* aforesaid, in the said County; after whose death the said goods and chattels came to the hands and possession of the said *Edward*, by his finding the same; and afterwards, (*that is to say*) on the 21st day of *July*, in the said sixth year, administration of all
and

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and singular the goods and chattels, rights and credits, which had been the property of the said *Edmund Spicer* at the time of his death, was in due manner granted to the said *Alexander*, as to the principal creditor of the said *Edmund*, by *T. E.* doctor of laws, the official surrogate, lawfully constituted to the worshipful *William Wells*, doctor of divinity, archdeacon of the archdeaconry of *Colchester*; and the said *Edward* altho' he very well knew the said goods and chattels were the property of the said *Edmund*, in his life time, and at the time of his death, and of right to belong to the said *Alexander*, after the decease of the said *Edmund*, by reason of the said administration; nevertheless contriving, and fraudulently intending, craftily and subtilly to defraud the said *Alexander*, in this particular, of the said goods and chattels, altho' the said *Edward* was by the said *Alexander*, afterwards, (*that is to say*) on the first day of *September*, in the said sixth year at *Barking* aforesaid, in the said county, required to deliver the same; yet the said *Edward* hath not delivered the said goods and chattels to the said *Alexander*; but he the said *Edward*, afterwards, (*that is to say*) on the said first day of *September*, in the said sixth year, converted the same to his own use and behoof at *Barking* aforesaid, in the said county of *Essex*, to the damage of the said *Alexander* 50*l.* and therefore he brings this suit, and so forth; and brings here into court the letters of administration, which testify the commission of the said administration in the manner as above; the date whereof is the same day and year for that purpose above specified.

Note; In a declaration in *Trover*, you must always set forth the value of the goods, and if the action is brought for things that are animate, that it is proper to say of the price of so much money.

² Esp. 352.
contra
from 2
Roll's Rep.

CUNNINSBY against RODD.

Michaelmas the third of King *James* the second. Roll. 833.

Hereford, *Hugh Rodd*, late of the city of *Hereford*, *Mercer*, was attach'd to answer to *Thomas Cunninsby*, Esq; in an action of *Trespass upon the case*, and so forth: And whereupon the said *Thomas* by *Hen. Baldwin* his attorney complains, that whereas on the first day of *December*, in the 30th year of the reign of his late majesty *Charles* the second, late King of *England*, and so forth, (which now must be called *Great Britain*) at *Marden* in the said county, a certain discourse happen'd and arose between the said *Thomas Cunninsby*, and the said *Hugh Rodd* of and concerning the tithes yearly growing and renewing of and from a certain meadow called *Gundy Meadow*, at *Marden* aforesaid; and upon such discourse, the said *Thomas* then and

¹ Lut. 219.
A declaration upon a special agreement relating to Tithes.

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P *180. and there affirmed, that he was seized of the said tithes, and was the proprietor thereof, which the said *Hugh* then * and there denied; and thereupon it was then and there agreed between the said *Thomas*, and the said *Hugh*, in the manner following, (*that is to say*) that the said *Hugh* should continue to gather and receive to his own use the tithes growing and renewing of and from the said meadow; and that if the said *Thomas* should recover against the said *Hugh* his damages in any action, to be prosecuted by the said *Thomas* against the said *Hugh* for any tithes, growing and renewing of and from the said Meadow; then the said *Hugh* should well and truly pay to the said *Thomas* the yearly sum of 20s. of lawful money of *England* (which must now be said of *Great-Britain*) for every year, in which the said *Hugh* should gather and receive the said tithes to his own use; and thereupon the said *H.* afterwards, (*that is to say*) on the first day of *December*, in the said 30th year, at *Marden* aforesaid, in consideration, that the said *Thomas* had undertaken, and then and there faithfully promised the said *Hugh*, that he the said *Thomas* would well and truly perform and fulfil the said agreement in every particular on his part to be performed, he the said *Hugh* undertook, and then and there faithfully promised the said *Thomas*, that he the said *Hugh* would well and truly perform and fulfil the said agreement in every particular on his part to be perform'd. And the said *Thomas* in fact declares, that he the said *Thomas* afterwards, (*that is to say*) in *Michaelmas* term in the 36th year of the reign of his said late majesty *Charles* the second King of *England*, (which must now be call'd *Great-Britain*) impleaded the said *Hugh* in his majesty's court of common pleas at *Westminster*, in the county of *Middlesex*, by an original writ of the said late King, in an action of trespass, for the taking and carrying away the said tithes, growing and renewing in and from the said meadow, in the said 36th year of the reign of the said late King, and that thereupon such proceeding was had in the said court, that afterwards (*that is to say*) in *Easter* term, in the second year of the reign of his present majesty *James* the second King of *England*, and so forth, the said *Thomas* by the consideration of the same court, recovered against the said *Hugh* 2d. for his damages, for taking and carrying away the said tithes growing and renewing as aforesaid, of and from the said meadow; and that the said *Hugh*, for the space of six years next ensuing the making the said agreement, gather'd and received the said tithes to his own use. And whereas also, afterwards (*that is to say*) on the first day of *December*, in the said 30th year of the reign of his said late Majesty, in consideration that the said *Thomas*, at the special instance and request of the said *Hugh*, would permit him to gather and receive the tithes, growing and renewing of and from the said meadow to his own use, the said *Hugh* then and there undertook, and faithfully promised the said *Thomas*, that he the said *Hugh* would well and truly pay to the said *Thomas* other 20s. of like

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promises of
performance.

Averment
of performance.

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like lawful money for every year, in which the said *Hugh* should so gather the said tithes to his use ; and the said *Thomas* in fact declares, that the said *Thomas* giving credit to the promise and undertaking of the said *Hugh* last above mentioned, permitted the said *Hugh* to gather, and receive to his own use the said last mentioned tithes, from the said first day of *December*, in the said 30th year, for the space of six years next ensuing. And whereas also P *181 the said *Hugh*, afterwards, (*that is to say*) on the first day of *August*, in the 2d year of the reign of his present Majesty, at *Marden* afore-said, in consideration that the said *Thomas*, at the like instance and request of the said *Hugh*, had permitted the said *Hugh* to gather and receive to his own use, for the space of six years then last past, other tithes of the said *Thomas*, growing and renewing of and from the said meadow, called *Gundey Meadow*, the said *Hugh* undertook, and faithfully promised the said *Thomas* that he the said *Hugh* would well and truly pay to the said *Thomas* other 20s. of like lawful money, for every year of the said six years ; nevertheless the said *Hugh*, having no regard to his said several promises and undertakings, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *Thomas* in this particular, hath not yet paid the said *Thomas* the said money, or any part thereof, but hitherto hath, and still doth refuse so to do, to the damage of the said *Thomas* 20l. and therefore he brings this suit, and hath sufficient proof of the premises.

An exception was said to be taken to the third count in the declaration, viz. that it was a promise made to do a collateral act, where there was not any duty created before ; but as the duty commenced with the promise, therefore a special request ought to have been alledged ; and for that purpose the following cases were cited. *Oltarston and Garton's case*, 3 Cro. 91. *Stile* 49. *Parmitor's case*, 1 Brownl. 13. *Gore and Calthrop*.

But thereto it was answered by the court, that when a promise is to do a collateral thing upon request, a special request ought to be alledged ; but otherwise where the thing is not to be done upon request, according to the following cases. *Hill and Wade's case*, 2 Cro 523. *Estrigge and Owen's case*, 3 Leon. Winch. 102, & 103. *Jones* 56. *Love against Kirby*, and *Peck and Methwold's case*, *Jones* 85. *Cro. Car.* 385. *Palmer and Knights case*, 2 Ven. 74, 75.

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CORYTON against LITHEBYE.

1 Vent.

167.

2 Lev. 27.

2 Keb. 631

803. 22.

38. 50.

2 Saund.

115.

Easter the Twenty-second of King Charles the Second, Roll 331.

P* 182.

Cornwall. Be it remembered that heretofore, (*that is to say*) in the term of St. Michael last past, Sir *John Coryton*, baronet, and *Richard Harvey* by *Richard Goodenough* their attorney, came before our sovereign Lord the King at *Westminster*, and brought here into this court of our said sovereign Lord the King, their bill against *John Lithebye*, being in the custody of the marshal of the *Marshal-jea* of our said sovereign Lord the King, before the King himself, in an action of *trespass on the case*; and there are pledges for the prosecution, (*to wit*) *John Doe* and *Richard Roe*; which said bill follows in these words. *Cornwall.* Sir *John Coryton*, baronet, and *Richard Harvey* complain of *John Lithebye*, being in the custody of the marshal of the *Marshal-jea* of our sovereign Lord the King, before the King himself, for this cause, (*that is to say*) that whereas one *William Findge*, on the 20th day of *July* in the 9th year of the reign of our late sovereign Lord *Charles* the first, late King of *England*, and so forth, was seized in his demesne as of a fee, of and in two water corn-mills, under one roof called *Castor-Mills*, within the manor of *Calliland* in the said county; and whereas the said *John Coryton*, on the 20th day of *April*, in the year of our Lord 1656, was, and ever since hath been, and now is seized in his demesne, as of a fee, of two other water corn-mills, under one roof called *Frogwell-Mills*, in the said manor: And whereas, as well the said *John Coryton*, as the said *William Findge*, and all others, whose estate they respectively have in the said mills, for so long a time as that there is no remembrance of any man to the contrary, have from time to time sufficiently repaired and amended the said mills at their own costs and charges, severally and respectively, and kept the same in repair for grinding of all manner of corn and grain, of all the tenants, inhabitants within the said manor, *which they had to be ground*, and to be by them used and consumed in their houses within the said manor; and also during all the said time, have kept and maintained millers to grind such corn and grain into meal; and in consideration thereof, they the said *John Coryton*, and *William Findge*, and all those whose estate they respectively have of and in the said respective mills, for so long a time, that there is no remembrance of any man to the contrary,

have

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have used, and been accustomed to grind at the said mills, or one of them, all the corn and grain into meal, of all the tenants of the said manor of *Calliland*, inhabitants within the said manor used and consumed by them in their said houses within the said manor; (that is to say) such of the corn and grain of the said tenants, inhabitants within the said manor, as have not been used to be ground at the said mills, called *Frogwel-Mills* ought, and during the time aforesaid, have been used and accustomed to be ground at the said mills called *Castor-Mills* and all the corn and grain of the said tenants, inhabitants within the said manor, as have not, during the time aforesaid, been ground at the said mills called *Castor-Mills*, ought to be, and during all the time aforesaid have been used and accustomed to be ground at the said mills called *Frogwell Mills*; and have received and taken, for the grinding of every bushel of the said corn and grain so ground, one gallon of and from every bushel of the said meal ground and made from such corn and grain; and so in proportion for a greater or lesser quantity, by way of toll for grinding the same. And the said *William Findge* being seized of his said mills, called *Castor-Mills*, he the said *William*, on the same 20th day of *July*, in the ninth year of the reign of our said late sovereign Lord King *Charles* the first, at *Launceston* in the said county, demised his said mills to the said *R. Harvey*, for the term of ninety-nine years, if *Sampson Harvey*, *Agnes Harvey*, and *Sampson Brent*, or either of them should so long live; by virtue of which said demise, the said *Richard* entered into the said mills called *Castor-Mills*, and thereby was, and now is possessed thereof, and whereas the said *John Lithebye*, was on the 20th day of *April*, in the year of our Lord 1651, and ever since hath been, and now is a tenant of the said manor, and possessed of a dwelling house therein, in which the said *John Lithebye* inhabited during all that time: Nevertheless the said *John Lithebye* not being ignorant of the premises, but contriving, and fraudulently intending to deceive and defraud the said *John* P* 183.
Corryton and *Richard Harvey* of the profits which should have arisen to the said *John* and *Richard*, by grinding the corn and grain of the said *John Lithebye*, which he had to be ground and used, and consumed in his said house, on the 20th day of *December*, in the 20th year of the reign of our sovereign Lord *Charles* the second now King of *England*, and before the day of exhibiting of them, the said *John Corryton* and *Richard Harvey*, hath not ground 100 bushels of wheat and 100 bushels of barley, which he had to be ground, and that were used and consumed within the said house of the said *John Lithebye* within the said manor; but he the said *John Lithebye*, during all that time hath ground the said corn and grain at other mills; whereby the said *John Corryton* and *Richard Harvey* have totally lost all the advantage of the toll of the said grain, to the damage of the said *John* and *Richard* 40l. and therefore they bring this suit, and sufficient testimony to prove the truth of the premises; together with this,

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this, that the said *John Corryton* and *Richard Harvey* are willing to verify that the said *Sampson Harvey* is now alive at *Launceston* aforesaid, in the said county of *Cornwall*,—to which there was a *Demurrer*, and a *Joinder* thereto.

2 Saund.
113.

The chief objections taken to this declaration were, first that it ought to have been said, *that the Defendant, and the Tenants, Inhabitants within that Manor, ought to have ground at the Mill of the Plaintiff Harvey, all the Corn that they did not grind at the Plaintiff Corryton's Mill, and that all the Corn that they did not grind at the Plaintiff Harvey's Mill, they ought to have ground at the Mill of the Plaintiff Corryton; therefore you may perceive that I have alter'd the Precedent in that manner.*

And the second objection was, *that the Prescription there was laid too general, and that thereby the Defendant could not use any Corn and Grain for feeding his Poultry, or to make any Fumety with, unless it was first ground: And therefore Judge Twisden said it was unreasonable; for which reason I have altered this precedent as I apprehend it should be.*

PETERS against OPIE.

Trinity the Twenty-third of King Charles the Second. Roll 319.

Cornwall. *Stephen Peters* complains of *Richard Opie*, gent. being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, for this cause, (*that is to say*) that whereas the said *Stephen*, was on the first day of *September*, in the 22d year of the reign of *King Charles the second*, and so forth, and long before had been, and now is a mason; and whereas, (*that is to say*) the said day and year, at *Bodmin* in the said county, in consideration that the said *Stephen*, at the special instance and request of the said *Richard Opie*, would build and erect for the said *Richard* the fences of three houses for hogs, and would cleanse and erect the walls of the same houses for the said *Richard*, he the said *Richard* undertook, and then and * there faithfully promised the said *Stephen*, that he the said *Richard* would well and truly pay 30s. of lawful money of *England* (which must now be said to be lawful money of *Great Britain*) to the said *Stephen*, whenever after he should be thereto required; and the said *Stephen* in fact declares, that afterwards, (*that is to say*) on the second day of *October*, in the 22d year of the reign of his present Majesty, he the said *Stephen*

P * 184.

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Stephen built and erected for the said Richard the fences of the said three houses, and likewise cleansed and built the walls of the same. And whereas also afterwards, (*that is to say*) on the fourth day of October, in the 22d year of the reign of his said present Majesty at Bodmin aforesaid, a certain discourse was had and arose between the said Stephen and the said Richard, as well concerning the pulling down, and laying to the ground, the fences and walls of the said houses of the said Richard before that time erected, as also concerning erecting and building a malt-house, and an out-house called a linny or dry-house, in the places where the walls of the said houses were then built; whereupon afterwards, (*that is to say*) the day and year last mentioned at Bodmin aforesaid, in the said county, it was agreed by the said Stephen and the said Richard, that the said Stephen should pull down, and lay to the ground, the walls and fences of the said three houses, and should build a malt-house, and an out-house called a linny or dry-house, for the said Richard, in the places where the said walls and fences of the said three houses before that time erected and built then stood, and would cover the said malt-house, and out-house called a linny or dry-house, with slate or stones called rags; and that the said Richard should pay the said Stephen for his labour, in and about the pulling down, and laying to the ground the said walls, and erecting and building the said malt-house and out-house, 8l. of lawful money of England, (which must now be called lawful money of Great Britain): And thereupon afterwards, (*that is to say*) the day and year last mentioned at Bodmin, in consideration that the said Stephen, at the special instance and request of the said Richard, undertook, and then and there faithfully promised the said Richard, to perform the said agreement in every particular on the part of the said Stephen to be performed, according to the form and effect of the said agreement, the said Richard undertook, and then and there faithfully promised the said Stephen, that he the said Richard would well and truly perform the said agreement, in every particular on his part to be performed; and the said Stephen in fact avers, that he always was from the time of making the said agreement hitherto ready, and offered to perform the said agreement in every particular on his part to be performed. And the said Stephen further avers, that after the making the said agreement, and before the time that the said Stephen exhibited his bill against the said Richard, (*that is to say*) on the first day of January, in the said year, he the said Stephen came with his servants, workmen and materials, in order to pull down, and lay to the ground the said walls and fences of the said three houses, and to build and erect in the place where they stood, a malt-house, and an out house called linny or a dry house, for the said Richard, and to cover the same with slates and stones called rags, according to the tenor of the said agreement; but the said Richard then and there hindered and

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promises.

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P *185. * and obstructed the said Stephen, his servants and workmen, from doing and performing the same. Nevertheless the said Richard having no regard to his said several promises and undertakings, but contriving, and fraudulently intending, craftily and subtilly to defraud the said Stephen in this particular, hath not paid to the said Stephen, either the said 30s. first above mentioned, or the said 8l. above specified in the said agreement, amounting in the whole to 9l. 10s. or any part thereof, or in any manner made any satisfaction to the said Stephen for the same, (altho' the said Richard afterwards, (*that is to say*) on the first day of March, in the 21st year of the reign of our sovereign Lord the King at Bodmin aforesaid, in the said county, was by the said Stephen thereto required) but the said Richard hitherto altogether hath, and still doth refuse to pay to the said Stephen the said 9l. 10s. or to make him any satisfaction for the same in any manner howsoever, to the damage of the said Stephen 20l. and therefore he brings this suit, *and so forth.*

It may be perceived that I have made an alteration to the precedent in *Saunders*, by inserting the above *Averment*, that the plaintiff was obstructed in performing that part of the agreement which was to be performed on his part; and the reason of it is, because, that the chief justice *Hale* was of opinion, that the declaration was insufficient for want of it; to which *Rainsford* agreed likewise, and the judgment was stayed a while, but it seems afterwards when the court was full, *Hale* chief justice, and the rest of the justices held, that as the plaintiff had alledged that he was ready, and offered to perform the agreement on his part, that was a sufficient averment after a *Verdict*; and the reason that my lord chief justice went upon at first, that the declaration was insufficient, was, because, as the defendant was to pay the plaintiff 8l. for his labour, the performance of that labour was a *condition precedent* to the promise, so that the plaintiff ought of necessity to have done the work, or at least have shewn that the defendant obstructed him therein before he made a demand of the money. And further, says he, if this agreement had been put into writing under the seal of the parties, it had been clear, that the plaintiff could not have maintained an action of covenant without such *Averment*; and he made this distinction, that if this money had been to have been paid at a *certain day*, peradventure the law would construe, that the defendant relied upon the plaintiff's mutual promise for his security; but here, as no time certain was limited when the money was to be paid, the law makes this construction, that it shall be paid when the work is done, and not before, unless the defendant shews cause why he could not finish it; and I have here inserted few cases to this point. 1 Saund. 320. 10 Co. 42. 1 Roll. A.

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115. 1 Roll. Rep. 122. 2 Leon. 128. 4 Leon. 70. 1 Bulst.
 167. Pop. 198. Godb. 8, 217. Hob. 41. 1 Vent. 178.
 5 Lev. 23. N. Lut. 78. 1 Saund. 49. Ante 61, 136.

* KEECH against KNIGHT.

P *186

Trinity the Third of King William and Queen Mary. Roll 364.

*London. William Knight, late of Westbeer in the county of Kent, clerk, was attached to answer to William Keech, in an action of 4 Mod. 188. Com. 204. trespass upon the case; and whereupon the said William Keech, by Carth. 271. Holt. 344. J. T. his attorney complains, that whereas one Nicholas Carrington 3 Lev. 319. 3 Lev. 315. in his life-time, (that is to say) on the first day of July, in the year of our Lord 1688, was lawfully possessed of a certain part, (being the moiety of a ship called the *Lawrell*, as his own proper part) and being so possessed of such his interest therein, afterwards (that is to say) the same day and year at *London* aforesaid, in the parish of *St. Mary Bow*, in the ward of *Cheap*, died possessed thereof. And whereas the said William Knight, afterwards, (that is to say) on the 13th day of July, in the year of our Lord 1689, at *London* aforesaid, in the said parish and ward, possessed (as he asserted) in right of *Anne* his wife, executrix of the last will and testament of the said *Nicholas Carrington*, of all the interest that the said *Nicholas Carrington* had in the said ship, (then being in her voyage upon the high seas) and that at that time there was, and would be due to the said William Knight, in right of his said wife, divers sums of money accruing and arising from the profits of the said voyage. And whereas afterwards, (that is to say) on the 13th day of July, in the year of our Lord 1682, at *London* aforesaid, in the said parish and ward, there was a certain discourse arose between the said William Keech and the said William Knight, of and concerning the buying and selling of all the said William Knight's interest in the said ship in right of his said wife, and the profits, accruing and arising from that voyage; and upon that discourse, it was then and there agreed between them, that the said William Knight should sell and convey to the said William Keech all his interest in the said ship, and should assign to the said William Keech all his profits accruing from that voyage; and that such sale and assignment should be reduced into writing; and that the said William Keech should pay to the said William Knight 600*l.* for all the said interest of the said William Knight; and for all his profits*

A discourse about the said ship.
 The agreement.

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of the per-
formance
on the part
of the
plaintiff.

The breach.

profits accruing from the said voyage, if his said interest, in right of his said wife should amount to one full moiety of the said ship, and if not, then according to the rate aforesaid, for all the interest of the said *William Knight* in the said ship, whether the same should be more or less than the said moiety; and that the said *William Keech* should pay to the said *William Knight* 23l. 10s. part of the said money, and the remainder thereof at the time of the execution of the said writings: And thereupon, in consideration that the said *William Keech* had then and there in hand paid to the said *William Knight*, the said sum of 23l. 10s. and then and there undertook, and faithfully promised the said *William Knight* to fulfil every particular on his part to be performed, he the said *William Knight* undertook, and then and there faithfully promised the said *William Keech*, that he the said *William Knight* would well and truly perform and fulfil the said agreement in every particular * on his part to be performed: *And altho' afterwards (that is to say) on the first day of August, in the said year of our Lord 1689, at London aforesaid, in the said parish and ward, he the said William Keech caused the said agreement to be reduced into writing, and then and there shewed the same to the said William Knight, and requested him to execute the same. Nevertheless the said William Knight having no regard to his said promise and undertaking made in the manner as above, but contriving, and fraudulently intending to deceive and defraud the said William Keech in this particular, then and there refused to execute the said writing, and hath not performed his said agreement in delivering to the said William Keech all his interest which he had in right of his wife in the said ship, and the profit accruing by the said voyage, altho' the said William Knight, afterwards (that is to say) on the 10th day of March, in the said 2d year, and often afterwards at London aforesaid, in the said parish and ward, was by the said William Keech thereto required; but the said William Knight hitherto hath, and still doth altogether refuse to perform the said agreement, to the damage of the said William Keech 600l. and therefore he brings this suit, and so forth.*

In the precedent from which this was taken, there is likewise another count for 23l. 10s. had and received by the defendant pleaded as to the second promise *non assumpsit*; and to the first, that the agreement was never reduced into writing, nor executed by the defendant, to which there was a demurrer and a joinder in demurrer, and the reporter says, that there was a verdict for the plaintiff, and an objection taken to the declaration, in arrest of judgment, that the breach there was laid too general; which was only, that the plaintiff had not performed his agreement, or paid the said 23l. 10s. and so they would have had it, that the plaintiff ought to have shewn some particular instance of the non-performance by the defendant; as to say the plaintiff tendered to him a writing which he had refused to sign, and that the defendant

had

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had not delivered his part of the ship; And they that were of counsel with the defendant would have it, that the plainriff ought to have done the first act, that is to render the writing, but the court seemed clearly of opinion, that the defendant was to sell his part by a writing, and therefore it was his business to make and tender that writing, as where there is a covenant to make a bond, the covenantor is to make and tender it; and it was said by the court that this being upon a mutual promise the breach was well assigned, especially after a verdict; but I leave it to the judicious, whether the above averment in shewing the above particulars is not material; and it may be perceived I have altered the declaration, that it might not be liable to either of the objections, which I apprehend is better in this manner, if the nature of the case will bear it.

* CRAFT against BOITE.

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Trinity 20, 21 of King Charles the Second. Roll 902.

London. Be it remembered that heretofore, (*to wit*) in the term 2 Keb. 496 of St. Michael last past, Joseph Craft a clergyman, by Daniel Mar- Raym. 181. rind his attorney, came before our sovereign Lord the King at West- 1 Vent. 22. minster, and brought here into his said Majesty's court his bill 1 Saund. against Joseph Boite, being in the custody of the marshal, and so 246. forth, in an action of trespass on the case, and there are pledges for 4 Saund. prosecuting, (*that is to say*) John Doe, and Richard Roe; which 241, 242, said bill follows in these words (*to wit*) London. Joseph Craft a 243, 244. clergyman, complains of Joseph Boite, being in the custody of the marshal of the Marshalsea of our sovereign Lord the King, before A declarati- on for the King himself, for this cause, (*to wit*) that whereas the said words spo- ken of a clergyman. Joseph Craft is a good, true, pious and honest subject, and liege person of our sovereign Lord the King, and hath always from the time of his nativity hitherto carried, behaved, and governed him- self, as such, a good, true, pious, faithful and honest subject, of our said sovereign Lord the King, and of his late Majesty King Charles the first, and hath been all his life-time hitherto held, re- puted, and esteemed of a good name, character, condition, conver- sation and reputation, as well by a great many worthy persons as others, great and faithful subjects of our said sovereign Lord the King, with whom the said Joseph Craft hath been acquainted; and moreover hath hitherto remained and continued as such, a faithful,

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faithful, and honest subject of his present Majesty, uncharged, untouched, and unsuspected of any kind of theft, felony, fraud, deceit or the guilt, or suspicion of any such enormous crimes, or either of them, by means of which good name, character condition, conversation and reputation; and by reason of his learning in the study of divinity at the university of *Oxford* for four years and upwards, had gained the favour and good will of several peers, and noblemen of this kingdom of *England*; and the said *Joseph Craft*, for the space of three years last past hath been, and now is a minister of the gospel, in the holy and established church of this kingdom of *England*, and hath taken upon himself the holy orders of the same; and during the whole time last above-mentioned, remained in that function, with the highest praise and commendation for his exemplary zeal for piety, innocency and integrity, so that he had thereby gained and obtained, not only the love and goodwill of all his neighbours, and other faithful subjects of our said sovereign Lord the King, and of the said several peers and noblemen, but also had daily reaped and received several great gains, profits and advantages, for the more ample and better support and livelihood of the said *Joseph Craft*, and whereby his wealth had been greatly increased. Nevertheless the said *Joseph Boite* well knowing the premisses, but contriving, and maliciously intending to deprive the said *Joseph Craft* of his good name, character, credit, esteem and reputation which he had before been endued with, and to bring the said *Joseph Craft* into an

The Gravenmen.

P*189. *opprobrious scandal, and the displeasure of all persons, as well those of worth, as others good and faithful subjects of our said sovereign Lord the King, and especially of his neighbours and friends, and to cause the said *Joseph Craft* to be punished according to the statutes and laws of this kingdom of *England*, made and provided for those who should commit any sort of theft or felony, on the 20th day of *October*, in the 20th year of the reign of his present majesty at *London*, (to wit) at the parish of *St. Mary Bow*, in the ward of *Cheap*, in the presence and hearing of several of his Majesty's faithful subjects, then and there being present, and hearing the same falsely and maliciously spoke, asserted, published and proclaimed with a loud voice these following false, fictitious, scandalous and opprobrious *English* words of the said *Joseph Craft*, (*that is to say*) *look, there is a young thievish Rogue*, (meaning and pointing with his finger to the said *Joseph Craft*, the now plaintiff) *didst ever see such a thievish Rogue*, *he* (again meaning the said *Joseph Craft*) *has stolen 200l. worth of Plate out of Wadham College*, (meaning *Wadham College*, in the University of *Oxford*;) and the said *Joseph Boite* continuing his malice against the said *Joseph Craft*, afterwards (*to wit*) on the 21st day of *October*, in the said 20th year of the reign of his present Majesty, at *London* aforesaid, in the said parish and ward, falsely and maliciously spoke, asserted, and with a loud voice, published and proclaimed

The words.

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proclaimed these other following, false, fictitious, scandalous, and opprobrious *English* words, of the said *Joseph Craft*, in the presence other- and hearing of several of his majesty's subjects, and of the said *Jo- words.* *seph Craft's* neighbours and friends then and there hearing the same, (*to wit*) *didst ever see such a thievish Rogue*, (meaning, and pointing his finger at the said *Joseph Craft* the now plaintiff) *he* (again meaning the said *Joseph Craft*) *stole 200l. worth of Plate out of Wadham College*, (meaning *Wadham College*, in the university of *Oxford*) whereas, in truth the said *Joseph Craft* never was guilty of, or committed the said felonies, or either of them, or any such like crime; by means of which speaking, proclaiming, and publishing the said several false, fictitious, scandalous, and opprobrious *English* words, the said *Joseph Craft* is not only injured and hurt in his good name, character, reputation and esteem, but also several of his Majesty's subjects on that occasion, every day more and more withdraw themselves from the acquaintance of the said *Joseph Craft*; and the said *Joseph Craft* hath been obliged and compelled to expend great sums of money and to undergo a great deal of bodily pains and labour to make manifest his innocency in the premisses, to the damage of the said *Joseph* 200l. and thereof he brings this suit, and sufficient proof of the premisses.

And now at this day, (*that is to say*) on Saturday next after the The plea. *Octaves of St. Hillary*, (to which day the said *Joseph Boite* had leave to imparl, and then to answer to the said bill, and so forth;) as well the said *Joseph Craft* by his said attorney, as the said *Joseph Boite* by *Andrew Loder* his attorney, came before our sovereign Lord the King at *Westminster*; and the said *Joseph Boite* defends the force and injury, and so forth, and saith, that the said *Joseph Craft* ought not to have or maintain his said action against him thereof, because he P * 190. saith, that long before the said several times, * when the said words Justifies the words. specified in the said declaration were supposed to be spoken by the said *Joseph*, (*that is to say*) on the first day of *June*, in the 20th year of the reign of his present majesty, the said *Joseph Craft* feloniously, and as a felon stole, took and carried away three ounces of silver plate, of the goods and chattels of the wardens, fellows and scholars of *Wadham College*, in the university and city of *Oxford*, in the county of the same city, by which the said *Joseph Boite*, afterwards (*to wit*) on the same 20th day of *October*, in the said 20th year of the reign of his present Majesty, in the presence and hearing of several of his Majesty's faithful subjects, being then and there present, and hearing the same spoke, asserted, and with a loud voice, published and proclaimed to and of the said *Joseph Craft*, the *English* words specified in the said declaration, (*here reciting the first words*) and afterwards (*to wit*) on the 21st day of *October*, in the said 20th year at *London* aforesaid, in the said parish and ward, he the said *Joseph Boite* likewise spoke, asserted, and with a loud voice, published and proclaimed to and of the said the *Joseph Craft* the other words

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words specified in the said declaration, *(to wit) didst ever, &c.* *(here reciting the other Words in the declaration, concluding thus)* as it was lawful for him to do for the reasons above; and this he is ready to verify; whereupon he prays judgment, whether the said Joseph Craft ought to maintain his said action thereof against him, and

Replication *so forth.*

that the defendant spoke the words of his own wrong, and without any such cause, as the defendant had alledged in his plea.

And the said Joseph Craft saith, that he, notwithstanding any thing above alledged by the said Joseph Boite, in his said plea, ought not to be precluded from having his said action thereof against the said Joseph Boite, because he saith, that the said Joseph Boite of his own wrong, and without any such cause, as is above alledged by the said Joseph Boite, in his said plea, on the same 20th day of October, in the said 20th year of the reign of his present majesty at London aforesaid, in the said parish and ward, spoke, asserted, and with a loud voice proclaimed and published of the said Joseph Craft, the said English words first above specified in the said declaration, *(to wit) look there's a young thievish Rogue, (here reciting the Words first above-mentioned in the said Declaration;)* and also afterwards, *(to wit, on the said 21st day of October, in the said 20th year, the said Joseph Boite spoke, asserted, and with a loud voice proclaimed and published of the said Joseph Craft the last other English words above-mentioned in the said declaration, (to wit) didst ever see such a thievish Rogue, (here reciting the said other Words concluding thus)* in such manner and form as the said Joseph Craft has above thereon declared against him; and this he prays may be enquired of by the country; and the said Joseph Boite prays likewise the same.

The issue.

The case.
3 Saund.
247.

After a Verdict, Saunders moved in Arrest of Judgment, alledging that in this case there was a Mis-trial; for the speaking the words at London, was confest by the Defendant in his Justification; and the Point of the Issue was, whether the Plaintiff committed the Felony alledged by the Defendant in his Justification or no; which was a matter triable, and ought to have been tried at Oxford, and cited the Case of Ford and Brook, in Crook Eliz. 261. where an Action for Slander of Perjury was brought against the Defendant at Dale in Essex; the Defendant justified, that he was perjured at Westminster, and the Venue was awarded from the County of Middlesex; and so is the Case of Boyer and Jenkins in Moor's Reports, 410. and it was clearly so at Common Law; but the Question was upon the new Statute of the 16 Ed 17 Car. 2. cap. 8. by which it is Enacted, that no Judgment shall be arrested or reversed, for that there was no right Venue, so as the cause was tried by the Jury of the proper county where the action was laid; and Saunders urged, that it ought to be interpreted, that the Cause shall be tried in the proper County where the Issue arises, and here it arises in Oxfordshire; for if a literal Construction be put upon that Statute, it will oust all the Trials by the proper County where a local Justification is pleaded, which arise out of the County where the Action is laid, as where it is for a false Imprisonment at London; and

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the Defendant justifies at Oxford as Sheriff of Oxfordshire, and traverses being guilty at London; now if the Issue should be join'd upon the Cause of Imprisonment, it ought to be tried in Oxfordshire, but by this Constrⁿ it might be tried at London; so that in this Case Saunders argued, that a wrong County was not aided or intended to be aided by that Statute; and Twisden was strongly of that Opinion; but Keeling, Chief Justice Rainsford and Morton, were of the contrary Opinion; and Judgment was given for the Plaintiff; but Quere whether this be Law, for 2 Mod. 24. is to the Contrary. And see further the following Cases relating thereto. 1 Mod. 37, 199. 2 Mod. 24. 1 Lev. 207, 208. 1 Sid. 326. 1 Vent. 22, 10, 263, 272. 2 Lev. 122, 164, 165. 2 Jo. 92. Ray, 392, 398. 3 Keb. 350, 371, 509. 6 Mod. 82. 2 Saund. 258. 3 Mod. 124. 5 Mod. 223. 2 Salk. 668.

ROBINS against ROBINS.

Cornwall. Stephen Robins, Gent. complains of John Robins, 2 Salk. 727
Gent. being in the custody of the marshal of the Marshalsea of our
sovereign Lord the King, before the King himself; for that where-
as on the 28th day of May, in the fifth year of the reign of our said
sovereign Lord the King, he the said Stephen Robins was indebted
to said John Robins in the sum of ten pounds and no more, for
Goods sold and delivered by the said Stephen, to him the said John,
and the said Stephen was not at that Time indebted to the said John
in any other greater Sum on any other Account whatsoever; nor had
the said John any legal cause of action against him the said Stephen,
on any other account whatsoever, so as the said Stephen ought to
have been arrested, put in prison and detained, until the said Ste-
phen could find sufficient sureties to answer to the said John in such
action. Nevertheless the said John well knowing the Premises,
but contriving, and maliciously intending, unjustly to bring into
trouble, oppress, damnify, and detract the said Stephen in his cre-
dit and reputation, he the said John on the 28th day of May, in
the sixth year of the reign of our said sovereign Lord the King at
*Bodmin in the said county, upon his corporal Oath, deposed * before*
J. M. lawfully authorized to administer such Oath, that the
said Stephen Robins at the Time of the said John Robins's taking
such Oath was justly indebted to him the said John, in the Sum of
forty Pounds and upwards, for Goods sold and delivered by the said
John to the said Stephen; and the said John afterwards, (that is to
say) on the sixth day of June, in the said sixth year of the reign of
his said present Majesty, caused the said Stephen to be arrested, under
a pretence and colour of a process at law, for the sum of forty pounds,
altho'

A declaration for maliciously holding to bail for 40l. when the sum due was but 10l. Salk. 15. 12 Mod. 273. 1 L. Ray. 503. Raym. Ent. 446.

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alcho' the said *Stephen* was always ready to have appear'd to any legal procefs for the said sum of ten pounds that was really, and in truth due from him the said *Stephen* to the said *John*, and to answer to the said *John* according to the tenor of such procefs. *Notwithstanding which* he the said *John*, the same day and year last above-mentioned, maliciously caused and procured the said *Stephen* to be arrested and imprisoned at *Bodmin* aforesaid, and to be there in prison detain'd for no other cause, but that the said *Stephen* was not able to find sufficient sureties to answer to the said *John*, according to the tenor of the said procefs sued out as above for the said sum of forty pounds, whereby the said *Stephen* was compelled to lay out and expend several large sums of money for his support in the said prison; and during the time he continued there on that occasion, his necessary affairs remained undone; and besides, the said *Stephen* was thereby greatly injured in the means of getting his livelihood for himself and family; and it was a manifest vexation and trouble to his mind, as well as tended to a great discredit and disgrace of him the said *Stephen*; whereupon the said *Stephen* declares, that he is injured and endamaged to the value of one hundred and fifty pounds, and thereof he brings this suit, and sufficient proof, when the court will consider thereof.

It may be perceived in 1 Salk. 15. that the Precedent from whence this was taken was held ill, because the Plaintiff ought to have shewn, that he was indebted to the defendant in so much money, and that the defendant took out such a writ for so much more, on purpose to hold him to bail; how else, says the Court, can it appear to us, whether, and how far, he might be held to bail in that action; therefore I have altered the Declaration as I apprehend it should be, and have here inserted, that the Defendant made an Affidavit pursuant to the late Act of Parliament for so much Money, when in truth there was no more due than the sum of ten Pounds; whether that is absolutely necessary I will not determine; but certainly 'tis a greater aggravation to shew it; and such Affidavit must now be filed before the Plaintiff can have his Writ, therefore it is easily to be had in Evidence, and Note, in 1 Saunders 228. 'tis said this Action lies not till the Original Action is determined.

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*Trinity Term, the Fourth of King William and P*193.
Queen Mary, C. B. Roll 306.

Middlesex. Justinian Isham, late of Lampert, in the county of Northampton, baronet, was attached to answer to Dorothy Panton, Widow, in an action, that whereas according to the law and custom of this Kingdom of England, of our sovereign Lord and Lady the King and Queen, hitherto used and approved of, every man and woman of this Kingdom of England is bound safely and securely to keep their fire by day and night, so that no damage may in any wise happen to any person of this Kingdom by fire, for want of due care thereof; wherefore the said Justinian kept his fire at the parish St. Martin in the Fields, in the said county, in so negligent and careless a manner, that by the defect of taking due care of such fire, certain houses, edifices and buildings of the said Dorothy, of the price of 1000l. were there burnt and destroyed, to the great damage of the said Dorothy, and contrary to the law and custom, *and so forth.* And whereupon the said Dorothy, by Thomas Goodall her attorney complains, that whereas according to the law and custom of this their said Majesties kingdom of England, hitherto used and approved of therein, every man and woman of this Kingdom of England is bound, safely and securely to keep, and take care of their fire by day and night, so that for want of such due care of their said fire, no damage may in any wise happen to any person of the said Kingdom. Nevertheless the said Justinian on the sixth day of May, in the first year of the reign of their said present Majesties, kept his fire at the parish of St. Martin in the Fields, in so negligent and careless manner, that for want of due care thereof, certain houses, edifices and structures, (*that is to say*) six stables, six haylofts, and three lodging-rooms of the said Dorothy, of the price, *and so forth,* were there burnt down and destroyed, to the great damage, *and so forth,* and against the peace *and so forth.* Whereupon the said Dorothy says she is injured and endamaged to the value of one thousand pounds; and thereof she brings this suit, and hath good and sufficient proof of the premisses, when the court will consider thereof.

3 Lev. 356,
7, 8.

A declaration for negligently keeping fire where- by the Plaintiff's stables, &c. were burnt down.

The writ. Salk. 19.

The declaration, setting forth the general law of the land.

The breach.

And the said Justinian, by Charles Draper his attorney, comes and defends the force and injury, when, and *so forth*; and says, that he is in no wise guilty of the premisses above charged upon him, as the said Dorothy above complains against him; and thereof puts himself upon the country, and the said Dorothy does likewise the same; therefore the sheriff is commanded, that he cause to come hither on the O⁸ave of the Holy Trinity, twelve, *and so forth,* by whom, *and so forth,* and who neither, *and so forth,* to recognize, *and*

The plea of not guilty.

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The postea. *and so forth*, because as well, *and so forth*. Afterwards on the day, and at the place within contained, the within named *Dorothy Panton*, widow, comes hither by her attorney within mentioned, and the within written Sir *Justinian Isham*, baronet, tho' solemnly required comes not, but makes default; therefore let the jury within mentioned be accepted of against him thro' his default, and the jurors of that jury having been summoned, are come hither, who being elected, tried *and sworn, to declare the truths of the within contents, say upon their oaths, that before the said time, when the within mentioned six stables, six haylofts, and three chambers of the said *Dorothy Panton*, are supposed in the within written declaration to have been burnt down, and destroyed, (*that is to say*) on the first day of *April*, in the within written first year of the reign of their present majesties, she the said *Dorothy Panton* was seized in her demesne, as of a fee, of and in the same six stables, six haylofts, and three chambers, with the appurtenances, situate and being in the within written parish of *St. Martin in the Fields*, in the county of *Middlesex*; and being so seized thereof, afterwards, and before the said time when, *and so forth*, (*to wit*) on the first day of *April*, in the said first year, she the said *Dorothy* demised to the said Sir *Justinian Isham*, bart. the now defendant, one stable, and one hayloft, with the appurtenances, for him the said Sir *Justinian Isham*, and his assigns, to have and hold the same from the said first day of *April*, in the said first year, for one week then next following, and so from one week to another, so long as the said *Dorothy* and *Justinian* should think fit, for the rent of 8s. of lawful money of *England* for every week, so long as the said *Justinian* should have and hold the said stable and hayloft, with the appurtenances, by virtue of the said demise. And on the same first day of *April*, in the said first year, she the said *Dorothy* demised five stables, five haylofts, and three chambers, with the appurtenances, the residue of the said tenements and premisses to five other persons, for divers terms and times then to come; and on the same first day of *April*, in the said first year, the said *Justinian Isham* entered into the said before mentioned demised stable and hayloft, with the appurtenances, and was possessed thereof; and on the same first day of *April*, the said five other persons entered into their five stables, five haylofts, and three chambers, with the appurtenances, demised to them as aforesaid, and were respectively possessed thereof. And the said *Justinian* being possessed as aforesaid of one stable, and one hayloft, with the appurtenances, as tenant to the said *Dorothy*, by virtue of the said demise, and they the said five other persons being possessed, as aforesaid, of the residue of the said tenements, with the appurtenances, by virtue of the said demise made to them as aforesaid, as tenants also to the said *Dorothy*, (the reversion of all and singular the premisses, with the appurtenances belonging to the said *Dorothy*) a fire through the negligence of the said *Justinian*, happened to be gin

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A special
verdict.

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in the said stable, demised aforesaid to the said *Justinian*, and being in his possession by virtue thereof. And on the same sixth day of *May*, in the said first year, it burnt down and totally destroyed, as well the said stable and hayloft, with the appurtenances demised to, and in the possession of the said *Justinian*, as also the said other five stables, five haylofts, and three chambers with the appurtenances demised as aforesaid to the said five other persons, and then being likewise in their respective possessions; but whether upon the whole matter aforesaid found by the said jury in the manner aforesaid, the said *Justinian* is guilty of the premisses within charged upon him, the said jury are altogether ignorant, and therefore they pray the advice of their Majesties Justices at *Westminster*; and if upon the said whole matter found by the said Jury in the manner aforesaid, it shall appear *to their Majesties Justices at *Westminster*, that the said *Justinian* is guilty of the premisses within charged upon him; then the said jury upon their oaths say, that the said *Justinian* is guilty of the premisses charged upon him in such manner and form as the said *Dorothy* within complains against him; and in that case do assess the damages of the said *Dorothy*, occasioned by the burning down, and destroying of the said one stable, and one hayloft, demised as aforesaid to the said *Justinian*, besides her expences and costs laid out by her about her suit in this cause to 15*l.* and do assess the damages of the said *Dorothy*, occasioned by the burning down and destroying of the residue of the said messuages and premisses, with the appurtenances, besides her said expences and costs to 85*l.* and for her expences and costs to 40*s.* but if upon the said whole matter found by the jury in the manner aforesaid, it shall appear to their said Majesties Justices at *Westminster*, that the said *Justinian* is in no wise guilty of the premisses within charged upon him; then the said jury say upon their said oaths, that the said *Justinian* is in no wise guilty of the premisses within charged upon him, as the said Sir *Justinian Isham*, baronet, hath within alledged in his defence; but because the court, &c.

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The chief question upon this Special Verdict was, whether the action would lie by the Lessor against her Lessee or Tenant at Will; and as to that it was resolved it would not, as to the Stable demised to him; but that the action would well lie as to the Stables demised to the other persons; and although the writ was, that no damage might happen to any person whatsoever, and not to the owners of the neighbouring Houses, yet the court, as to that, held the writ was maintainable. This Case is likewise reported in Salkeld 19. 3 Lev. 359.

Michaelmas

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*Michaelmas the Thirty-fifth of King Charles the
Second. C. B. Roll 459.*

1 Lev. 171.
to 179.

A declaration for digging in such manner, and so near the Plaintiff's house that it fell down, so that he was forced to remove to another habitation, and was not able to carry on his trade of a Sadler therein.

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*London. Thomas Kensley, late of London, Vintner, Robert Fenwick, late of London, Vintner, John Howard, late of London, Carpenter, and John Fitch, late of London, Bricklayer, were attached to answer to Henry Barwell, Esq; in an action of Trespass upon the Case, and whereupon the said Henry, by Samuel Moor his attorney complains, that whereas the said Henry on the 24th day of April, in the 34th year of the reign of his present Majesty Charles the second, King of England, and so forth, dwelled and long before had dwelt with his family at London, (to wit) in the parish of St. Dunstan in the West, in the ward of Farringdon without, in a messuage situate, and lying in the said parish and ward, and then carried on, and exercised the art and mystery, or trade of a Sadler, in the said messuage, and in a shop, parcel of the same, and had prepared and intended to have used, exercised, and continued his dwelling and imployment in his said art and mystery of a sadler, in the same messuage and shop, for the space of a year then to come; he the said Henry Barwell, then having a legal right and title to continue and dwell in the said messuage and shop, and there to use and exercise his said art and mystery for * so long time) for the better support and maintenance of himself and family. Nevertheless the said Thomas Kensley, Robert Fenwick, John Howard, and John Fitch, well knowing the premises, but contriving, and maliciously intending to hinder and deprive him of dwelling with his family in his said messuage, and also of the exercise of his said trade in the said messuage and shop, on the 24th day of April, in the year aforesaid, at London aforesaid, in the said parish and ward, they pulled down, and laid to the ground, the foundation of a certain house next adjoining to the said messuage of the said Henry Barwell, and dug the soil and ground, there contiguously adjoining to the said messuage of the said Henry Barwell in such manner, and so near the foundation of the said messuage of the said Henry Barwell, and cast forth so great a quantity of earth coming from thence, that by digging of the said soil and ground, and casting forth the earth proceeding from thence, a great part of the said messuage of the said Henry Barwell, then and there fell to the ground, and the remainder of the said messuage became totally disjoined, walled and spoiled; by reason whereof he the said Henry Barwell was obliged and compelled with himself and family, to depart from their said habitation, and continue to live out of the same, for the space of eleven months then next following; and during all that time, was compelled and obliged to lay out great sums of money,*

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as well in and about procuring, and providing another habitation for himself and family, and for the removing himself, his family, goods and and merchandizes to such other habitation; as also by reason of his payment of rent for his said messuage (so as aforesaid pulled down) for the space of eleven months, and also he the said *Henry Barwell* at *London* aforesaid, in the said parish and ward, during all that time totally lost, and was deprived of all the use and exercise of his said art and mystery in the said shop, (that shop being well known and accustomed, and to which several noblemen, and others, subjects of our said sovereign Lord the King, used to repair to buy saddles, and such other goods and merchandizes, as belonged to the said art and mystery of the said *Henry Barwell* :) Whereupon the said *Henry Barwell* saith, he is injured and endamaged to the value of 300*l.* and therefore he brings this suit, and hath good and sufficient proof of the premisses, when the court will consider thereof.

And the said *Thomas Kensley*, and *Robert Fenwick*, by *Robert Bird* The defendants plead their attorney, and the said *John Howard*, and *John Fitch*, by *Thomas Pargiter* their attorney, come and defend the force and injury, when, *and so forth*, and say that the said *Henry* ought not to have his said action thereon against them, because they plead, that lately, before the suing out of the said original writ of the said *Henry* (that is to say) in the term of *St. Michael* last past, the said *Henry*, and one *Susannah Barwell*, spinster, impleaded one *Robert Bird*, and them the said *Robert Kensley*, *Robert Fenwick*, *John Howard*, and *John Fitch*, and one *John Stephens* now deceased, in his life-time, by the names of *Robert Bird*, late of *London*, gentleman, *Thomas Kensley*, late of *London*, Vintner, *John Finch*, late of *London*, bricklayer, and *John Stephens*, late of *London*, ———— in the court of common bench of our sovereign Lord the King in an action of *Trespass*, in which action they the said *Henry*, *and *Susannah* in the same term of *St. Michael* last past, in declaring here in the same court of common bench of our said sovereign Lord the King, against *R. B.* and them the said *T. K. R. F. J. H. J. F.* and the said *J. S.* complained by the said *Samuel Moor*, their attorney, that they the said *Robert Bird*, *T. K. R. F. J. H.* and *J. S.* on the 24th day of *April*, in the 34th year of the reign of his said present Majesty, with force and arms, *and so forth*, dug in the soil of them the said *Henry* and *Susannah*, under the foundation of their house, situate in the parish of *St. Dunstan in the West*, in the ward of *Farringdon without*, *London*, and cast forth the earth proceeding from thence; by which digging of the soil, and under the foundation of the said house, and casting forth the earth proceeding from thence, a great part of the house, of them the said *Henry* and *Susannah* fell to the ground, and the remainder of the said house became totally disjoined, wasted and spoiled; and by reason thereof, they the said *Henry* and *Susannah*, not only lost, and

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and were deprived of all the profit and benefit of their said house for a long time, (*to wit*) from the said 24th day of *April*, in the said year, until the day of the suing out of the original writ of them the said *Henry* and *Susannah*, but also several goods and chattels of them the said *Henry* and *Susannah*, (*to wit*) one hundred and fifty saddles, to the value of 150*l.* twenty bridles, to the value of 15*l.* ten dozen of halters, to the value of 5*l.* five dozen of bits, to the value of 30*s.* five dozen of stirrups, to the value of 4*l.* (*and several other goods there recited*) by the fall of the said house, were totally broken, spoiled and destroyed, and became of no value to the said *Henry* and *Susannah*, and did them other wrongs, *and so forth*, to the great damage, *and so forth*, and against the peace, *and so forth*. Whereupon they the said *H.* and *S.* declared, that they were endamaged to the value of 500*l.* and thereof they brought their suit, *and so forth*. And the said *R. B.* in his own person, and the said *T. K.* and *R. F.* by *Theodore Walpole* their attorney, and the said *J. F. J. H.* and *J. S.* by the said *P. T.* their attorney, then came and defended the force and injury, when, *and so forth*, and pleaded, that they were in no wise guilty of the said *trespass*, as the said *H.* and *S.* had declared against them; and thereof they put themselves upon their country, and the said *H.* and *S.* did likewise the same; therefore the sheriff was commanded that he should cause to come hither in fifteen days of *St. Martin*, twelve, *and so forth*, by whom, *and so forth*, and who neither, *and so forth*, to recognize, *and so forth*, and because as well, *and so forth*, at which day came hither the said parties, *and so forth*, and the sheriff made no return of the writ; therefore the sheriff was as before commanded, that he should cause to come hither, *on the octave* of *St. Hillary*, twelve, *and so forth*, to recognize in the manner aforesaid; at which day the jury were respited in the said action between the said parties, until the *octave of the purification of the Blessed Virgin Mary*, then next following, unless *Sir Francis Pemberton* his said Majesty's chief justice of the common bench assigned by force of the statute, *and so forth*, had come before on *Saturday* the third day of *February*, then next following at *Guildhall, London*; and on the said *octave of the Purification of the Blessed Virgin Mary*, the said *H. B.* and *S. B.* by their said attorney, and the said *Robert Bird* in his own person, * as also the said *T. K. R. F. J. H.* and *J. S.* by their attorney within contained came. And the said chief justice before whom, *and so forth*, then returned hither his record in these words: *Afterwards* the within named *H. B. Esq.* and *S. B. spinster*; as also the within written *R. B. T. K. R. F. J. F. J. H.* and *J. S.* came by their said attornies within mentioned, on the day, and at the place within contained, before *Sir Francis Pemberton*, knight, his Majesty's chief justice of the common bench, and *Adam Baynes*, gent. (he being associated to him by force of the statute, *and so forth*) and the jurors of the jury whereof

The defend-
ants plea.
The issue.
The award
of the ve-
nire, writ,
continu-
ances.

P * 198.

* Note, this
was left out
of the en-
try, but I
apprehend
through
mistake,
therefore I
have insert-
ed it. The
postea.

mention

Actions on the Case.

mention is within made, being summoned, some of them, (*to wit*)
J. M. S. H. A. S. R. D. T. Y. R. E. R. C. and *H. M.* come, and
 are sworn upon that jury; and because the rest of the jurors of
 that jury do not appear, therefore at the request of the said *H.* and
S. and by the command of the said chief justice, others of the
 standers by elected for that purpose, are by the within sheriffs of
London newly appointed, the names of whom are affixed in the
 within written panel, according to the form of the statute in that
 case made and provided; and the jurors so newly appointed, (*to wit*)
T. A. J. H. T. J. and *J. W.* being required are come, who
 being elected tried, and sworn together, with the said other ju-
 rors before impanelled and sworn to declare the truth of the within
 contents, say upon their oaths, that the said *T. K. R. F. J. F. J. H.*
 and *J. S.* are guilty of the within written trespass, in such manner
 and form, as the said *H. B.* and *S.* do within complain against
 them, and do assess the damages of the said *H.* and *S.* on the occa-
 sion within written, besides their expences and costs laid out by
 them about their suit in this cause, at 1211, and for their expences
 and costs, at 53s. and 4d. and the said jurors upon their said oath
 further declare, that the said *R. B.* is not guilty of the said trespass,
 as the said *R. B.* has within alledged in his defence; therefore it
 was so considered that the said *H. B.* and *S.* recovered against the
 said *T. K. R. F. J. F. J. H.* and *J. S.* their said damages assessed
 by the said jury in the manner aforesaid; and also 16l. 6s. 8d.
 awarded by this court, by way of increase to the said *H.* and *S.* at
 their request, for their said expence and costs, which said da-
 mages in the whole amount to 40l. and that the said *T. K. R. F.*
J. F. J. H. and *J. S.* should be taken for their fine, and so forth;
 and that the said *Henry* and *Susannah* should be amerced for their
 false claim against the said *R. B.* for that the said *R. B.* was above
 acquitted by the said jury of the trespass aforesaid. Afterwards,
 (*to wit*) on the 19th day of June, in the 35th year of the reign of
 his present Majesty, the said *H.* and *S.* came into this court by *J. H.*
 constituted their attorney by a special warrant made to him for that
 purpose, and acknowledged, that satisfaction is made to them for
 the said damages; therefore the said *T. K. R. F. J. F. J. H.*
 and *J. S.* are acquitted and discharged of the said damages, and
 so forth, as by the record and proceedings thereof remaining here
 of record in this same court of his said present Majesty may plainly
 appear. And the said *T. K. J. F. J. H.* and *J. S.* further plead,
 that the said house mentioned in the record of the said recovery,
 to be the house of the said *H.* and *S.* and the messuage above speci-
 fied in the declaration of the said *H.* are one and the same, and not
 different messuages and houses: and that the digging in the soil
 under the foundation of the house of the said *Henry* and *Susannah*,
 and casting forth the earth proceeding from thence, by which
 said digging the said soil and earth under the foundation of the

Verdict
 that some
 of the de-
 fendants
 are guilty.
 That one is
 not.

The judg-
 ment for
 the plaintiff
 as to the
 defendants
 found guil-
 ty.
 For the de-
 fendant
 that was
 acquitted.

Satisfaction
 acknow-
 lodged by
 warrant of
 att. 10. y.

An aver-
 ment of the
 identity of
 the houses
 burnt.
 P * 199.
 own.

Actions on the Case.

faid house, and casting forth the earth proceeding from thence, a great part of the said house fell to the ground, and the remaining part of the said house became totally disjoined, wasted, and spoiled mentioned in the record of the said recovery, and the pulling down, and laying to the ground the foundation of the said messuage next adjoining to the said *Henry*, and the digging of the soil and ground there contiguously adjoining to the messuage of the said *Henry* into so much of, and so near the foundation of the said messuage of the said *Henry*, and casting out the earth proceeding from thence in such manner, that by digging the said soil and ground, and casting out the earth proceeding from thence, a great part of the said messuage of the said *Henry* fell to the ground, and the remaining part of the same became totally disjoined, wasted and spoiled, whereof the said *Henry* above complains against them, are the same digging, and casting out of the earth, and not several or different trespasses, matters and things; and that the said falling down to the ground of a great part of the house, and the totally disjoining, wasting and spoiling of the remaining part of the said house, mentioned in the said record of the said recovery, and the said falling down to the ground of a great part of the messuage, and totally disjoining, wasting and spoiling, the remaining part of the same, whereof the said *Henry* above complains against them, are the same falling down, disjoining, wasting and spoiling, and not several or different; and that the said *Henry Barwell*, named in the record of the said recovery, and the said *Henry Barwell* likewise named now in the said writ and declaration thereon, are one and the same, and not different persons; and the said *T. K. R. F. J. F.* and *J. H.* named in the record of the said recovery, and the said *T. K. R. F. J. F.* and *J. H.* now named in the said writ and declaration of the said *Henry*, are one and the same, and not different persons; and that the said damages before assessed in the said former action were assessed and recovered in full satisfaction of all the damages sustained by the said *Henry Barwell*, on the occasion mentioned in the said declaration in the said former action, (*to wit*) at *London* aforesaid, in the said parish and ward; and this they are ready to verify; whereupon they pray judgment whether the said *Henry* ought to have his said action thereof against them, and so forth.

To which there was a demurrer, and special causes assigned in this manner, (to wit) for that the said plea doth not directly, but evasively answer to the several matters above charged upon the said T. R. J. H. and J. F. and that it is defective in form, and so forth; to which there was a joinder in demurrer.

3 Lev. 179. Upon the argument of this case the question was, whether the recovery pleaded above should be a good bar; and chief justice Jones held, that it should not. 1st, Because the trespass in the former action, and that set forth in this declaration, are not the same, and

An averment of the identity of the falling down of the house.

An averment of the identity of the person of the plaintiff, the like of the defendants. That the damages recovered in the former action were in full satisfaction.

Actions on the Case.

and then the averment of their identity is repugnant and void ; for in the former action the digging is laid to be in the plaintiffs soil, and under the foundation of their messuage ; but in this action it is laid to be only so near the foundation of the plaintiffs messuage. 2dly, The former action is brought by two plaintiffs, for throwing down their messuage, and spoiling their goods ; and this action is brought by one of them only, and for the loss of his trade for eleven months ; and in the other action all the time extends only to six or seven months at farthest ; and therefore the averment, that the damages in the first action were given in full satisfaction is repugnant and void. But *Windham, Charleton, and Levinz*, were of the contrary opinion, and judgment was therefore given for the defendant. And the reasons for their judgment were, 1st, That in this action it is not only said so near, but that he dug into so much of, and so near the foundation, and therefore that was of the same signification, as to say he dug the foundation itself ; for the messuage did not fall until the foundation itself was dug ; for if it had sunk by only digging near the foundation, then there was not any time for digging the foundation itself ; and therefore in digging the foundation, and digging so much of, and so near the foundation, are only several ways of expressing the same thing. And as to the 2d point they said, that in the former action, the plaintiffs called the messuage their messuage, and the goods their goods, and therefore it ought to be intended that they were joint tenants in the messuage, and partners in the goods. And as to the 3d point they said, that the averment as to the damages was not repugnant ; for the words that mention that they lost all the profit and benefit of the messuage, include the trade in the messuage ; for by the tumbling down of the messuage there could be no trade used therein, and then of necessity they must provide another messuage for their habitation and trade, and so it is within the words of having lost all the profit and advantage of the said messuage ; and in the other action the jury might, and ought to have given damages for all that is laid in that action, (*to wit*) for want of habitation, loss in the trade in the messuage, as necessary consequents of the falling down of the same ; as in an action for battery, the jury always give damages for the cure, pain, and loss of time, as necessary consequents of the battery without any special damages laid in the declaration ; but suppose the jury ought not to have given damages for the loss of trade in the messuage, yet after they have done so, and it is so averred, and judgment is thereupon given, it is a bar in that action until it be reversed by attain ; as in *Palmer and Lawson's case* in *B. R.* in an *assumpsit* against an *executor*, and he pleads a judgment in debt against him on simple contract, although

Actions on the Case.

though debt did not lie in that case, yet the judgment was held to be a good bar to an *assumpsit* until it be reversed; for which reason, and to avoid multiplicity of suits, judgment was given for the defendant; but I don't find any objection was taken to the declaration.

P * 201. * *Trinity* the Thirty-fourth of King *Charles* the Second. Roll 2045.

Yorkshire. William Jefferson, late of Skidby, in the said county, yeoman, was attached to answer to Samuel Jefferson, in an action of trespass on the case, and so forth; and whereupon the said Samuel, by Thomas Robinson his attorney, complains, that whereas one William Cocke now deceased, had been in his life-time, (*that is to say*) on the 30th day of January, in the year of our Lord 1658, at Skidby, seized in his demesne as of a fee, of and in a messuage, with the appurtenances, situate and being in Skidby aforesaid, held of the manor of Skidby in the said county, by a copy of the court-rolls of the said manor, at the will of the Lord, according to the custom of that manor; and being so seized thereof, the said William Cocke; afterwards, (*that is to say*) on the same 30th day of January, in the said year, out of the court of the manor aforesaid, according to the custom of the said manor, surrendered the said messuage with the appurtenances, by the name of the *grass-place*, built adjoining upon the east end of a field in Skidby aforesaid, (amongst other things) into the hands of the Lord of the said manor, by the hands and acceptance of Thomas Thompson and John Avis, two of the customary tenants of the said manor, to the use of the said Jane then his wife, for the term of her life, and after her decease to the use of the said Samuel Jefferson his heirs and assigns; and the said William Cocke being so seized of the said messuage, with the appurtenances in the manor aforesaid, the said William, afterwards, (*to wit*) on the first day of April, in the year of our Lord 1658, at Skidby aforesaid, died seized of such his estate, after whose death, (*to wit*) at a court baron of William Wrench, gent. then Lord of the said manor of Skidby, held for the said manor at Skidby aforesaid, on the fifth day of April, in the year of our Lord 1659, before Robert Bethel, gent. then steward of the said manor, the said surrender made as aforesaid, was duly presented and inrolled; and the said Jane was then and there rightfully and lawfully admitted a tenant (amongst other things) to the said messuage, and the appurtenances for the term of her life, the remainder thereof belonging

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longing to the said *Samuel*, his heirs and assigns in manner as aforesaid, by virtue of which said surrender and admittance, the said *Jane* entered into the said messuage, with the appurtenances, and was seised thereof in her demesne as of a freehold, for the term of her life, at the will of the Lord, according to the custom of the said manor, the remainder thereof belonging as aforesaid to the said *Samuel*, his heirs and assigns) and she the said *Jane* being so seised thereof, married the said *William Jefferson* at *Skidby* aforesaid; whereby the said *William Jefferson*, and *Jane*, became sised of the said messuage, with the appurtenances in their demesne, as of a freehold, in right of the said *Jane*, for the term of her life, at the will of the lord, according to the custom of the said manor. And the said *William* and *Jane* being so seised thereof, (the remainder thereof, after the decease of the said *Jane*, belonging to the said *Samuel*, his heirs and assigns, in the manner aforesaid.) Nevertheless the said *William Jefferson* well knowing the premises, but contriving, and fraudulently intending totally to deprive, and disinherit the said *Samuel* of the said messuage, with the appurtenances, and also greatly to injure, diminish, and render of small value, the estate and interest of the said *Samuel*, of and in the said messuage, with the appurtenances; the said *William* on the first day of *February* in the 34th year of the reign of his said present Majesty, at *Skidby* aforesaid, with force and arms, pulled down, and laid to the ground a barn, part of the said messuage, to the value of 50*l*. and then and there took, carried away, and sold the wood, stones, roofs, and other materials of the said barn, and converted, and disposed of the money arising therefrom to his own use; whereby the said *Samuel* is not only greatly hurt and injured in his estate and interest, of and in the said messuage, with the appurtenances, but also the said *Samuel* is totally disinherited and deprived of the above mentioned part of the said messuage, with the appurtenances; and thereof he brings this suit, and hath sufficient proof of the premises, when the court will consider thereof. To which there was a *Demurrer*, and a joinder thereto.

And married W. Jefferson.

P * 202.

The gravamen.

And upon the argument two objections were made against the action. *First*, That no such action lies, for that the lord chief justice *Coke*, upon the statute of *Gloucester*, relating to waste, said, that at the common law, he in reversion had not any remedy for waste committed by him possessed of the term, because it was the folly of him seised of the reversion, that he had not taken security against that by a covenant. *Secondly*, That the jury could not know what damages to give, for that it was uncertain how long the tenant for life might live, and the messuage may be repaired by her in her life-time; and it seems that *Windham* and *Charleton* were strongly of that opinion; but *Femberton* chief justice, and *Levinz*, were of the contrary opinion; and it appears by the report, that no judgment was delivered thereon; but *quære*, whether the reasons

3 Lev. 150.

Actions on the Case.

sons for the latter opinion are not best, (*to wit*) that *Coke* is to be understood according to the subject matter of which he is speaking, *i. e.* he hath not any remedy by an action for *waste*; and *Pemberton* said, that a *lessor* at that day might, without doubt, relinquish his remedy by an action of *waste*, and take his action upon the case against the lessor for the *waste*, 2 H. 4. 12. a copyholder may maintain an action upon the case against a stranger who cut the trees, and the Lord may have another action of the trespass done to the inheritance. 19 H. 6. 45. 3 Cro. 461. *Jeremy* against *Lowther*. Husband seised in fee, in right of his wife, makes a lease for years, and the lessee burns the house, the husband may bring an action, and by two judges then in court this action will lie; notwithstanding the *objection*, that an action of *waste* lay not at common law, and yet there the *lessor* might have secured himself by a *covenant*; and in the case here the plaintiff is not a *lessor*, but a *tenant in remainder*, by a copy of the court-rolls, with whom no covenant could be made; and if he can have no remedy by this way, he can have none at all; and sure it would be unreasonable for him to be compelled to tarry until the death of the wife, to see if the defendant would repair it in the mean time; for perhaps in the mean time, the plaintiff, or defendant might die, and then the

P *203. action * being a *tort* died with the person. And as to the *damages* not being able to be ascertained, they may be so, as well as where a man purchases an estate with the *covenant* from the *vendor*, that it is free from incumbrances, and an *estate for life* is evicted; and observe in 3 Mod. 92, in the case of the *mayor and commonality of Norwich* against *Johnson*, it is there held, that this action would lie against an *executor de son tort* possessed of a term; and it was said by the court, that it would be an infinite trouble for him in the reversion to seek for his remedy for the *waste*, if the law obliged him to stay till there was a rightful administrator; and that this *statute of Gloucester* was a *remedial*, as well as a *penal* law, and therefore shall have a favourable construction.

Sir LYONEL WALDEN against MITCHELL.

2 Ventr. *Huntingdonshire.* *John Mitchell*, late of *Huntingdon* in the said
263. for county, *Maister*, was attached to answer to Sir *Lyonel Walden*,
words of a in an action of *trespass upon the case*; and whereupon the said
member of *Lyonel*, by *Robert Clark* his attorney, complains, that whereas the
parliament, said *Lyonel* now is a good, true, pious, faithful, and honest subject,
calling him said *Lyonel* now is a good, true, pious, faithful, and honest subject,
papist and and liege man, of our sovereign Lord and Lady the King and Queen,
pensioner. and

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and hath from the time of his nativity hitherto carried, behaved and governed himself as such a good, true, pious, faithful and honest subject, and a liege man of our said sovereign Lord and Lady the King and Queen and their predecessors, ought to do, and hath during all that time, been held, esteemed, and reputed of a good name, character, conversation and behaviour, as well amongst a great many worthy and faithful subjects of our said sovereign Lord and Lady the King and Queen, and their predecessors, as also among all his neighbours and acquaintance; and during all that time hath been, and now is a true professor of the protestant and reformed religion, established by the laws of this kingdom, professing and exercising the same with great integrity, and always frequenting and hearing divine service in his own *parish church*, or in some other *church, chapel*, or usual place of *common prayer*, according to the practice of the church of *England*, and never was reconciled to the *Romish* church, nor ever was a professor of the *Romish* religion, or even went to mass. And whereas the said *Lyonel* was a *Burgess* or *Member of Parliament*, for the town of *Huntingdon*, in the county of *Huntingdon*, in the parliament of *Charles* the second, our late sovereign Lord the King of *England*, begun and held at *Westminster*, in the county of *Middlesex*, on the 8th day of *May*, in the 13th year of his reign, and during the said whole parliament to the time of its dissolution, justly and faithfully served as such *Burgess* or *Member of Parliament*, and during all that time, performed the duty of his trust and office of a *burgess* or member of the same parliament; and the said *Lyonel*, in order to perform the trust of his said office of *Burgess* and *Member* of the same *Parliament*, and to transact other affairs, made and performed several journeys from the said town of *Huntingdon* to the cities of *London* and *Westminster*. Nevertheless the said *John* in no wise ignorant of the premises, but contriving, and maliciously intending, not only greatly to injure and detract the said *Lyonel* in, and deprive him of his said good name, character, and reputation, but also to cause the said *Lyonel* to be brought under the pains and penalties, published and provided by the statutes of this Kingdom of *England*, against papists and subjects of this kingdom, who frequent and hear mass; he the said *John* on the 8th day of *December*, in the year of our Lord 1668, at *Huntingdon* aforesaid, in the said county, in the open and publick market at that time held there, having a discourse with one *Thomas Waddington*, (then a servant to the said *Lyonel*) of and concerning the said *Lyonel* and his religion, and of his having been a *Burgess* or *Member* of the said *Parliament*, for the said town of *Huntingdon*, in the presence and hearing of a great many persons, then met together in the said public market; and being there present, falsely and maliciously, openly, and publickly spoke, repeated, proclaimed, and with a loud voice published and pronounced, to the said *Thomas Waddington*, (then and there being a servant to the

Setting forth the plaintiff to be a protestant.

and never a professor of the romish religion; that he hath been a member of parliament, and did his duty therein justly.

P * 204.

That a discourse was had of the plaintiff's religion, and of his being a member of parliament.

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The words. said *Lyonel* these following false and scandalous *English* words of
 the said *Lyonel*, (*to wit*) your master (meaning the said *Lyonel*) is a
papist; when he (meaning the said *Lyonel*) is at home, he (meaning
 the said *Lyonel*) goes to church; but when he (again meaning the said
Lyonel) is at London he (again meaning the said *Lyonel*) goes to mass,
 (meaning the mass performed in the *Romish* Church) Sir *John*
Cotton, meaning one Sir *John Cotton* of *Stratton*, in the county of
Bedford, baronet, another burgess, or member of the said parlia-
 ment for the said town of *Huntingdon*, and he (again meaning the
 said *Lyonel*) were both pensioners, (meaning that the said Sir *John*
Cotton, and the said *Lyonel* had received pensions from his said late
 Majesty King *Charles* the second, to consent to, and give their
 votes for the passing of laws and statutes, to the oppression of his
 said late Majesty's subjects) all the time of the long parliament,
 (meaning the said parliament wherein the said *Lyonel*, and the
 said *John* had been burgesses or members, as aforesaid.) And the
 said *John* of his further malice, afterwards, (*to wit*) on the same
 day and year last mentioned at *Huntingdon* aforesaid, upon another
 discourse, then and there had with the said *Thomas Waddington*,
 (being then and there a servant to the said *Lyonel*) of and con-
 cerning the said *Lyonel* and his religion, and of his having been a
 burgess or member of parliament for the said town of *Huntingdon*,
 in the presence and hearing of a great many other persons being
 there assembled together in the publick and open market, he the
 said *John Mitchell* for the purpose aforesaid, falsely and maliciously,
 openly and publickly spoke, repeated, asserted, and with a loud
 voice, published and pronounced these other false, feigned, and
 scandalous *English* words following of the said *Lyonel*, he the
 said *Thomas Waddington*, then and there being a servant to the
 said *Lyonel*, as aforesaid); (*to wit*) your master (meaning the said
Lyonel, whose servant the said *Thomas* then was, as aforesaid) is a
papist; when he (meaning the said *Lyonel*) is in the country, he
 (again meaning the said *Lyonel*) goes to church; but when he (again
 meaning the said *Lyonel*) is at London, he (again meaning the said
Lyonel) goes to mass, (meaning the said *Lyonel* to have gone to hear
 mass performed in the *Romish* Church) Sir *John Cotton* (again
 meaning the said Sir *John Cotton*, and he (again meaning the said
Lyonel) were both pensioners all the time of the long parliament;
 by means of speaking and publishing of which false, feigned, scan-
 dalous and malicious words, he the said *Lyonel*, is not only greatly
 injured and prejudiced in his good name, reputation and character,
 but hath also been obliged and compelled to expend several great
 sums of money, and undergone a great deal of fatigue and bodily
 labour, to falsify the said rumours spread of him the said *Lyonel*,
 to the damage of the said *Lyonel*, 200*l.* and thereon he brings this
 suit, and good proof of the premises, when the court will con-
 sider thereof.

Of the de-
fendant's
further ma-
lice.

He spoke
other
words.

P * 205.

Upon

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Upon not guilty pleaded, and a verdict for the plaintiff, he had his judgment. 2 Vent.
265.

Middlesex. S. G. complains of J. W. Vicar General in Spiritual Matters to the reverend father in God, John, by divine providence, lord bishop of Chester, (being in the custody of the marshal of the Marshalsea of our sovereign Lord the King,) for this cause, (to wit) whereas he the said S. (*such a Day and Year* at the parish of St. Peter's Chester, in the city of Chester, was duly elected to the place and office of one of the Church-wardens of the parish of St. Peter aforesaid, and then and there offered himself to the said J. who then was, and ever since hath been, the Vicar General in Spiritual Matters, and lawfully constituted principal official to the reverend father in God, John, by divine providence lord bishop of Chester, and requested the said J. to administer to the said S. the usual oath to be taken by him, as one of the church-wardens of the said church; and the said J. (to whom the administration of such oath to be given to the said S. as one of the church-wardens of the said church, of right belonged,) well knowing the premises, but contriving and maliciously intending unjustly to oppress the said S. in this particular, and altogether to deprive him of his said office, then and there did, and ever since hath unlawfully and maliciously refused to administer such oath to the said S. of which injury committed, as aforesaid, against the said S. he the said S. afterwards, (to wit) *such a Term, in such a year*, in the court of our said sovereign Lord the King, before the King himself, then being at Westminster, in the county of Middlesex, humbly beseeching the assistance and justice of the same court, prayed relief, and his said majesty's writ of *Mandamus* to be directed to the said J. and thereby to command him, that he should administer to, and receive from the said S. the usual oath of one of the church-wardens of the said church, and admit him to the said place and office of one of the church-wardens of the said parish church; and it was then and there granted to him. Whereupon afterwards, (*that is to say*) *such a Day and Year*, there issued out of the said court, at the prosecution of the said S. his said Majesty's writ of *Mandamus* directed to the said J. his official or surrogate, or to any other judge whatsoever competent in that particular; by which said writ, his said Majesty reciting, that whereas the said S. had been duly elected and chosen to the place and office of one of the church wardens of the said church of St. Peter, within the said city of Chester, according to the custom of the said parish * of St. Peter, within the said city; and although the said S. had presented himself to the said J. and offered to take his oath for the well-behaving himself in the said place and office of one of the church-wardens of the said parish church

Lut. 1012.
An action upon the case against the bishop's chancellor, for not swearing one of the church-wardens chosen by the parishioners into his office.

P * 206.

Actions on the Case.

church before the said *J. W.* Nevertheless the said *J. W.* (to whom it of right belonged to administer the oath of church wardens of the said parish church,) declined receiving such oath from the said *S.* or at least unjustly deferred the same, to the great damage and injury of the said *S. G.* and to the manifest prejudice of his condition, as his said Majesty had received information by the complaint of the said *S.* wherefore the said *S.* besought his Majesty to order him proper relief in this particular; and our said sovereign Lord the King, being desirous to provide for the said *S.* due and speedy justice in this particular, according to the rules of justice, commanded the said *J.* as he had before commanded him, that he should administer to, and receive from the said *S.* the oath which a church warden of the said parish, within the said city of *Chester*, had thentofore used to take, and which the said *S.* ought to have taken before him; and that he should without delay, under the penalty of *80l.* for the neglect thereof, admit the said *S.* to the place and office of one of the said church wardens of the said parish church, or should signify to his said Majesty a reason to the contrary, lest on his default therein there should happen to be a repeated complaint made to his said Majesty; and in what manner his said Majesty's command should be executed, he should make appear to this court, *on Tuesday next after the Morrow of All-Souls*, returning his said Majesty's writ; which said writ afterwards, and before the return of the same, *(to wit)* such a Day and Year, was delivered to the said *J.* (then, and yet vicar general in spiritual affairs, and lawfully constituted principal official to the said bishop,) to be executed in due form of law. And the said *S.* then and there offered himself, and prayed the said *S.* to receive him, and to administer to him the usual oath of one of the church wardens of the parish church of *St. Peter*, and to admit and institute the said *S.* into the place and office of one of the church wardens of the said church, according to the command of the said writ, which the said *J.* then and there refuse and ever since hath refused to do; and instead thereof, he the said *J.* then being vicar general, and principal official as aforesaid, to the prejudice of the said *S.* made a false return on the said writ, into the court of our said sovereign lord the King, before the King himself, *(to wit)* at *Westminster* aforesaid, in the manner following, *(that is to say)* that the said *S.* had not been elected and chosen to the place and office of one of the church wardens of the said parish church, and for that reason he did not, neither could he administer the oath, which had been usually taken by the churchwardens of the said parish church, or admit the said *S.* into the place and office of one of the church wardens of the said parish church, as by the said writ, and the return thereof remaining affiled on record, in the court of our said sovereign Lord the King, before the King himself at *Westminster*, more fully may appear; by means whereof the said *S.* is totally deprived of and from the enjoyment

Actions on the Case,

enjoyment of the said place and office, and was obliged to lay out his money therein to no manner of purpose, to the damage of the said S. 100l. and thereof he brings his suit, and sufficient proof of the premisses, when the court will consider thereof. P *207

This declaration is said in *Lutwych* 1013. to have been draw by *Pollexfen* and *Holt*.

Middlesex. Henry earl of S. one of the peers and noblemen of this kingdom of *Great Britain*, by *Fotherly Baker* his attorney, as well for our sovereign Lord the King, as for himself, complains T. G. Gent. one of the attornies of his Majesty's court of common pleas, present here in this court in his own person, in an action of *Trespas upon the Case*, for this cause, (to wit) that whereas in a statute of our late sovereign Lord *Richard* the second, late King of *England*, in the second year of his reign, amongst other things, "It is ordained, and strictly prohibited under great pain, that none be so bold to devise, speak, or relate of prelates, dukes, earl, barons, and other nobles and great men of his said Majesty's kingdom of *England*, nor of the chancellor, treasurer, or clerk of the privy seal, steward of his Majesty's household, the justices of the one bench, or of the other, nor of any great officers of the said kingdom, any false news, lies, or any such like falsehoods, whereby debates and discords might arise between the lords and the commons, and whereof great peril and mischief might come to the realm; and whomsoever should so do, should have and incur the punishment lately ordained for that purpose, by the statute of *Westminster* the first, as in the said statute, it is more fully contained" Nevertheless the said T. paying no regard to the said statute, nor in any wise fearing the punishment ordained thereby, but contriving to injure and prejudice the good name, condition, credit, dignity and honour of the said earl, and to bring the said earl into great displeasure with his said Majesty, and with the noblemen and great officers of that part of this kingdom of *Great Britain* called *England*, and also with several other worthy men, subjects of our said present Majesty, on the 10th day of *November*, in the fifth year of his said Majesty's reign at *Westminster*, in the said county of *Middlesex*, in the presence and hearing of several liege people, of that part of this kingdom of *Great Britain* called *England*, with an intent to defame and scandalize the said earl, falsely and maliciously devised, spoke, repeated, published and proclaimed divers false news, and horrid lies of the said H. being then and now earl of S. and one of the peers and noblemen of that part of this kingdom of *Great Britain* called *England*, in these *English* words following, (to wit) my Lord of S. (meaning the said H. then and now earl of S.) is playing
the

Actions on the Case.

the Fool at Coventry, and I (meaning the said T.) hope he will be hanged, for he (meaning the said earl) deserved it long ago, and my Lord (meaning the said earl) is a base and unworthy Man; by means whereof the said earl is greatly prejudiced and scandalized in his reputation, honour and dignity, and the said earl hath thereby lost the favour, honour, and good esteem of our said sovereign Lord the King, and of other noblemen of * that part of this kingdom of Great Britain called *England*, which they before had and entertained for the said earl; and on that occasion, several rumours and scandals are arisen and spread abroad amongst a great many peers and noblemen, and other subjects of our said sovereign Lord the King, within that part of this kingdom of *Great Britain* called *England*; and by reason of the premisses much infamy and discord arose, and is daily more and more likely to arise between the said earl, and several noblemen and others, subjects of this kingdom, to the great disturbance of the peace, and tranquillity of this kingdom, and in contempt of the laws thereof, and to the great scandal and injury of the said earl, and to the damage of the said earl 1000*l.* and contrary to the form of the said statute; and therein he prays relief, and hath good proof of the premisses, when the court will consider thereof.

The pledges for }
prosecuting } are { *John Doe,*
 } { *Richard Roe.*

How against PERRY.

Winford. Mich. the eleventh of King *William* the Third.

Gloucestershire. *Thomas Perry*, late of *Yate*, in the said county, Grocer, was attached to answer to *John How*, Esq; one of the privy council to her present Majesty our sovereign Lady the Queen, in an action of *Trespass upon the Case*; and whereupon the said *J.* by *B. H.* his attorney, complains, that whereas he the said *John* hath always been a good, true, faithful, honest, and sincere liege man, and subject, as well to his late Majesty *William* the third, late King of *England*, from the time of his happy accession to the throne and government of this kingdom of *England*, as also to her present Majesty, and hath always been of a good name, character, conversation and condition, and hath been so accounted, known, and reputed, not only by his neighbours, and other faithful subjects of this kingdom of *England*, but also by the peers and noblemen of the same, and even by the late King himself; and the said *J.* thereby gained to himself, and acquired so great a reputation, credit, and esteem with all his late Majesty's faithful subjects,

Lut. 72.

93.

An action
for words
spoken of a
Candidate
for member
of Parlia-
ment before
his electi-
on.

Actions on the Case.

jects, but more especially with the gentlemen of great honour, and freeholders of the said county of *Gloucester*, electors of the knights of the said shire, members of parliament for the said county; so that of their own free-will and choice, he had been made and appointed one of the knights of the shire for that county, and at several parliaments of the said late King, was one of the members of the house of commons, and served in the same truly, faithfully, and honestly, with great reputation and credit, and continually endeavoured with all his might to serve the said late King, and his people, for the publick good of this kingdom, and had done, performed and transacted several important affairs, and always employed his endeavours for the true service and interest, as well of his said late Majesty, as of all his faithful subjects, more especially *opposing *Lewis* the *French* King, and all others whatsoever enemies P *209 to his said late Majesty King *William* the Third, their favourers, and adherents, and in every thing as much as in him lay, always took care of, preferred and laboured for the publick good, as a true and sincere friend to his country, and the laws and liberties of this kingdom of *England*, and was always as much as in him lay, an adversary to and strenuous opposer of the exorbitant, and grown strength and power of the said *French* King. And whereas his said late Majesty King *William* the Third, before the speaking and publishing the false and scandalous words herein after specified, (to wit) on the 13th day of *November*, in the 13th year of his reign, ordained his parliament to be held at his city of *Westminster*, on the 13th day of *December* then next following; and on the same 13th day of *December*, a writ of his said late Majesty issued out of his chancery, directed to the sheriff of *Gloucester*, for the electing two knights of the shire to serve at the then approaching parliament, as members for the said county; and the said *J.* at that election intended to stand a competitor or candidate, for the place of one of the said knights of the said shire, for the said parliament, and in and through the said county there was a common talk, and publick report, that he should then stand, and be chosen a candidate, to be, as he before had been, one of the knights in parliament for the said county. Nevertheless the said *T.* well knowing the premisses, but contriving, designing, and maliciously intending, unjustly to disquiet the said *J.* and in an extraordinary and grievous manner, to hurt and injure him in his good name, character, reputation and esteem, and to deprive the said *J.* of the favour, love, and good opinion, not only of the gentlemen and freeholders of the said county, but also of all others, faithful subjects to his said late Majesty, towards the said *J.* with a malicious intent, that the said *J.* might never be chosen one of the knights, or members of parliament for the said county, or for any other place whatsoever, lately and before the said election came on in the said county, (to wit) on the third day of *December*, in the 13th year of his said late Majesty,

Actions on the Case.

Majesty, the said *Thomas*, in the presence and hearing of several freeholders of that county, and of several other liege people of our said sovereign Lord the King, openly and publickly, falsely and maliciously spoke proclaimed and published certain false, scandalous, and opprobrious words of the said *J.* in the following *English* words, (*to wit*) *Jack How* (meaning *John*, the now plaintiff) *is an enemy to the King and kingdom*, (meaning the said late King in this Kingdom of England,) *and is in the French interest*,) and in these following *English* words, (*to wit*) *Mr. How* (meaning the said *John*,) *is an enemy to the King and kingdom*, (meaning the said late King and this kingdom of England,) *and is in the interest of the French King*; moreover in the following *English* words, (*to wit*) *How* (meaning the said *John*,) *is in the French interest of France*, and also in these *English* words, (*to wit*) *Jack How* (meaning the said *John*,) *is in the French interest*; and further in these *English* words following, *Mr. How* (again meaning the said *John*,) *is in the interest of the French King*; by means of speaking, proclaiming and publishing of which false and scandalous words, the said *John* is not only grievously injured in his said good name, character, reputation credit and esteem, and fallen into great scandal and ignominy, with several faithful subjects of his said late Majesty, and of her present Majesty, and especially with the gentlemen and freeholders of the said county of *Gloucester*, so that they would not, but altogether refused at the said election, to choose him one of the knights of parliament, for that county; but also the said *J.* is thereby greatly obstructed in transacting several of his honest and lawful affairs, to the damage of the said *J.* 1000*l.* and therefore he brings his suit, and good proof of the premisses, when the court will consider thereof.

P * 210.

For rescuing a distress for a rent.

Gloucestershire. *Edward Goodman*, late of *Stawerton*, in the said county, yeoman, was attached to answer to *Dorothy Burnham*, widow, in an action; that whereas the said *Dorothy*, by *R. G.* her servant, had caused a cow to be taken at *Stawerton* in the said county, for a rent due to her in fee, and there impounded the said cow, according to the law and custom of this kingdom of *England*; wherefore the said *Edward*, with force and arms broke the said pound, and took and carried away the said cow from thence, and did her other wrongs, to the great damage of the said *Dorothy*, and against the peace of our sovereign Lord the King; and whereupon the said *Dorothy*, by *J. B.* her attorney, complains, that whereas certain tenements, (*to wit*) one messuage, and one rood of land, with the appurtenances, were holden by one *T. M.* of one *W. B.* at the yearly rent of 3*s.* payable on the feast of *St. Michael the Archangel* every year, of which said rent the said *W. B.* was seised by the hands of the said *T. M.* as by the hands of his very tenant; and being so seised thereof, the said *W.* made his last will and testament at *Stawerton* aforesaid, and thereby (*amongst other things*,) gave and devised

Actions on the Case.

devised the said rent to the said *Dorothy*, for her the said *Dorothy* to have and hold the same for her life; and afterwards the said *W.* died at *Staverton*, seised as aforesaid of the said rent, after whose death she the said *Dorothy* was seised of the said rent in her demesne, as of a freehold, for the term of her life, by virtue of the said devise; and being so seised thereof, she the said *Dorothy* afterwards, (*to wit*) on the 27th day of *October*, in the year of our Lord 1698, by *R. G.* her servant, caused the said cow to be taken and there impounded, according to the law and custom of this kingdom of *England*, in two rods of land, parcel of the said messuage, and one rood of land at *Staverton* aforesaid, for the said yearly rent for four years being in arrear, on the feast of *St. Michael the Archangel* then last past, and unpaid to the said *Dorothy*; and the said *E.* afterwards, (*that is to say*) on the same 27th day of *October*, in the said year of our Lord 1698, at *Staverton* aforesaid, with force and arms, broke into the said pound, and from thence took and carried away the said cow, and did him other wrongs, and so forth, to the great damage, and so forth, and against the peace, and so forth; whereupon she declares that she is injured and endamaged to the value of 20*l.* and thereof she brings her suit, and good proof of the premises, when the court will consider thereof.

*ALWAYES against BROOME and others.

P*211.

Trinity the Seventh of King *William* the Third.

Suffolk. *Thomas Broome*, late of *Snape*, in the said county, innholder, and *Robert Dawis*, late of *Tunstall*, in the said county, yeoman, was attached to answer to *William Alwayes*, in an action; whereas the said *W. A.* would have taken some cattle doing him damage, (*to wit*) five hogs of the said *Thomas Broome*, at *Snape* aforesaid, and would have impounded them according to the law and customs of this kingdom of *England*, and had impounded only one thereof; wherefore the said *Thomas* and *Robert*, together with one *William Bankes*, late of *Snape* aforesaid, husbandman, with force and arms rescued the said four hogs so as aforesaid, not impounded at *Snape* aforesaid, and with force and arms broke the said pound, and took and carried away the said hog that was impounded, as aforesaid, and did him other wrongs, to the great damage

Lut. 1259. The Writ.

Actions on the Case.

The declaration that the plaintiff would have distrained five hogs, and would have impounded them, but had impounded one only. That the defendant with others rescued the said four hogs, and broke the pound, and from thence took the hog that was impounded. Bar. The defendant Davies pleads not guilty, and issue there-
 mage of the said *W. A.* and against the peace of our sovereign Lord the King, and our sovereign Lady *Mary* late Queen of *England*; and whereupon the said *W. A.* by *W. B.* his attorney, complains, that whereas the said *W. A.* would have taken some cattle doing him damage, in five acres of land at *Snape* aforesaid, (to wit) five hogs of the said *Thomas Broome*, and would have impounded them, according to the law and customs of this kingdom of *England*, and had impounded one of them only at *Tunstall*; wherefore the said *Thomas* and *Robert*, together with, and so forth, on the 28th day of *June*, in the year of our Lord 1694, and so forth, with force and arms at *Snape* aforesaid, rescued the said four hogs so as aforesaid not impounded, and took and carried away the said hog so impounded as aforesaid, and did him other wrongs, and so forth, to the great damage, and so forth, and against the peace, and so forth; whereupon he declares that he is injured and endamaged to the value of 10*l.* and thereupon he brings his suit, and good proof of the premisses, when the court will consider thereof.

And the said *Thomas* and *Robert*, by *John Dawson* their attorney, come and defend the force and injury, when, and so forth; and the said *Robert* pleads that he is in no wise guilty of the premisses, whereof the said *W. A.* above complains, and thereof he puts himself upon the country, and the said *W. A.* doth likewise the same; and the said *Thomas*, as to coming with force and arms, and breaking the said pound above supposed to be broken, pleads, that he is in no wise guilty thereof, and thereof he puts himself upon his country; and the said *W. A.* doth likewise the same; and as to rescuing the said four hogs, and taking and carrying away the said impounded hog above supposed to be done, whereof the said *A.* by his declaration above complains, the said *Thomas* pleads, that he the said *W. A.* * ought not to have his said action against him, because he says, that the said five acres of land, with the appurtenances, in which the said five hogs of the said *Thomas* (to wit) the said four hogs, and one hog above-mentioned by the said *W. A.* in the said declaration, to have been taken as aforesaid, are, and at the time of the taking, were the five acres of land, with the appurtenances, called the *Home-Marsh*, in *Snape* aforesaid, which said five acres of land, with the appurtenances are and at the said time, when and so forth, were the soil and freehold of the said *Thomas*; whereupon the said *Thomas* at the said time when the said rescue was supposed to be made, took, and carried away the said five hogs, out of the custody of the said *W. A.* as it was lawful for him to do; which said taking and carrying away the said five hogs done in the manner and form, and for the reason aforesaid, is the same rescue of the said four hogs, and taking and carrying away the said one hog, whereof the said *W. A.* above complains; and this he is ready to verify; wherefore he prays judgment, whether the said *W. A.* ought to have his said action thereof against him, and so forth.
 And
 hogs out of the custody of the plaintiff, which is the same trespass, &c.

Actions on the Case.

And the said *William* replies, that he ought not to be precluded from having his said action, by reason of any thing above alledged, because he says, that at the said time when, *and so forth*, he the said *W.* was seised of a close of land, with the appurtenances, called the *List*, in *Snape* aforesaid, in his demesne as of a fee, being the said five acres of land, with the appurtenances above-mentioned in the said declaration, and that the said *William* had taken the said hogs doing him damage, (*to wit*) in his close called the *List*, and would have impounded them according to the law and custom of this kingdom of *England*, and had impounded one of them at *Tunstall* aforesaid; and that the said *Thomas* and *Robert*, together with, *and so forth*, on the 28th day of *June*, in the year of our Lord 1694, with force and arms, at *Snape* aforesaid, rescued the said hogs so as aforesaid not impounded, and with force and arms broke the said pound, and took and carried away the said hog that was impounded as aforesaid, as the said *William* above thereof complains against him, *without that*. That those hogs were taken in the said five acres of land, with the appurtenances called the *Home Marsh*, as the said *Thomas* and *Robert* above in pleading thereto have alledged; and this he is ready to verify: Whereupon in as much as the said *Thomas* and *Robert* do above acknowledge the breaking the said pound, and the taking and carrying away the said one hog, and the rescuing the residue thereof, the said *William* prays judgment, and that his damages on that occasion may be awarded to him, *and so forth*.

Replication
that he was
seised in
fee of a
close called
the *List*,
being the
said five
acres in the
declaration,
and so re-
cites that
part of the
declaration,
and trav-
ses, that
they were
taken in the
home
marsh.

Rejoinder,
That as to
the rescue
of the four
Hogs, by
the replica-
tion suppo-
sed to have
been taken
P * 213.
in the *List*
new assign-
ed; and as
to the tak-
ing and
carrying
away the
said one
Hog, that
the plaintiff
ought not
to have his
action, be-
cause that
at the time
when the
five Hogs
were taken,
the defen-

And the said *Thomas* as to the said rescuing of the said four of the five hogs, above supposed by the said *W. A.* in his replication to have been taken by the said *William*, doing him damage in the said place now assigned, called the *List*, in *Snape* aforesaid; and as to the taking and carrying away the said one hog above supposed by the said *William* in his replication to have been by him impounded for the said damage, above supposed to be done by the said one hog, in the * said new assigned place called the *List*, in *Snape* aforesaid, he says, that the said *W. A.* ought not to have his said action thereof against him, because he pleads by way of rejoinder, that after the said *W. A.* had taken the said hogs doing damage in the said new assigned place, and before that the said *Thomas* had taken and carried away the said hogs out of the custody of the said *W. A.* (*to wit*) on the 28th day of *June*, in the said year of our Lord 1694, at *Snape* aforesaid, he the said *Thomas* offered to pay the said *W. A.* 10s. of lawful money of *England*, for the said damage done as aforesaid by the said hogs, in the said new assigned place, which said 10s. were sufficient amends for the damage done to the said *W. A.* in the said new assigned place, which said 10s. the said *W. A.* then and there did, and ever since hath refused to accept of, and would have then and there impounded the said hogs for the said damage done in the said new assigned place; for which reason the said *Thomas*, at the said time when, *and so forth*, took

Actions on the Case.

dant tendered
amends.

and carried away the said five hogs out of the custody of the said *W. A.* at *Snape* aforesaid, as he might well do; which said taking and carrying away the said five hogs in the manner and form, and for the reasons aforesaid, is the same rescue of the said four hogs, and the taking and carrying away the said one hog, taken by the said *W. A.* as aforesaid, doing damage in the new assigned place above mentioned by the said *William* in his replication, and whereof the said *W. A.* above complains; and this he is ready to verify; wherefore he prays judgment, whether the said *W. A.* ought to have his said action thereof against him, and so forth.

To which there was a Demurrer, and a Joinder in Demurrer; and the chief exception that was taken was, that the Defendant in his Bar pleads that the place where the Cattle was taken was his Freehold, and by his rejoinder pleads Tender of Amends, and so the Plaintiff's Counsel would have had it that it was therefore a Departure; but as to that the Court held, that the pleading the Tender of Amends was not any Departure, because it was pleaded to a Trespass in the new assigned Place; and the Bar by that new assignment was gone.

Another exception was taken, that the Plaintiff had declared, that one of the hogs was impounded, and the defendant had said they were all in the possession of the plaintiff, and that then he tendered him Amends, but had not traversed that one of them was impounded; for if one of them was impounded, the Tender as to that came too late; and altho' he had pleaded Not-guilty to the Pound-Breach, yet that would not mend the matter; for it might be that he did not break the Pound, because the Door of the Pound might be open, and then it was no Pound-Breach to take the hog out of it, yet the Tender of Amends as to that came too late; and of that opinion it seems was the whole court, for saying all the hogs were in the possession of the plaintiff when he tendered Amends, was but argumentative, and not any direct answer, that one of the hogs was not impounded before.

Lut. 1262.

P* 214

*Another exception was taken to the writ, that it was in part a writ of Rescue, and in another part, a writ of Pound-Breach, which are two distinct writs in the register, but at another day the plaintiff had Judgment by the opinion of the whole court.

A declaration in case by the Occupier against the Rector, for not taking away his Tithes set out and divided.

Bellum (to wit) *Robert Startup* complains against *John Dodderidge*, clergyman, in an action of *Trespass upon the Case*, and there are pledges for the prosecution, (to wit) *John Doe* and *Richard Roe*; and whereupon the said *Robert*, by *G. E.* his attorney, complains, that whereas the said *John*, on the 23d day of *June*, in the third year of the reign of his present Majesty, was, and long before had, and ever since hath been, and now is, rector of the parish church of *Whatlington*, in the county of *Sussex*, and within the jurisdiction of this court; and whereas also the tithes of grass, corn and hay, from time to time growing, renewing and arising within the said parish, are, and for so long a time as there is no remembrance of

any

Actions on the Case.

any man to the contrary, have been payable to the rector of the said church for the time being; and the proprietors of any grass, corn, or hay growing, renewing and increasing in the said parish, during all that time have used, accustomed, and ought, to divide, set out, and leave the tithes of grass, corn and hay, divided from nine parts thereof, for the use of the rector for the time being; and the rector of the said church for the time being, at his own costs and charges, within a convenient time after the dividing, separating, setting out, and leaving the said tithes, and notice thereof given to him, hath used, and ought to carry away from off the lands whereon such tithes have grown, been renewing and arising, the said tithes, so as aforesaid divided, separated, set out and left; and whereas the said Robert, on the 24th day of June, in the third year of the reign of her said present Majesty, was, and long before had, and ever since hath been, and now is, a possessor and occupier of a close of land, with the appurtenances called the *Kings-Hill*, otherwise *Kingsland-Meadow*, in *Wharlinton* aforesaid, and within the said jurisdiction, containing by estimation eighteen acres; and being so possessed thereof, the said Robert, afterwards, (*that is to say*) on the 28th day of June, in the year aforesaid, mow'd the hay growing, renewing, and encreasing on the said eighteen acres of land lying at *Wharlinton* aforesaid, and within the jurisdiction of the said court, and then and there made and set up the same in cocks, and after the making the same into cocks, he the said Robert then and there, in a due and proper manner, divided, separated, and set the 10th part from the nine other parts thereof, and left the same for the use of the said John, then and now rector of the said church, and also the said Robert, afterwards, (*to wit*) on the 29th day of June in the said year, at *Wharlinton* aforesaid, and within the jurisdiction of the said court, gave notice thereof to the said John, then and now rector of the said church. Nevertheless the said John well knowing the premises, but contriving and maliciously intending to deprive and obstruct the said Robert from having and receiving the profit of his said close, did not carry away the said tithes of hay, (*to wit*) twenty-five cocks of hay, divided, separated, set out, and left for the tithes of hay of the said close, but permitted the said twenty-five cocks of hay to stand and remain upon the said close for a long time, (*to wit*) from the said 29th day of June, until the 26th day of August next following, whereby the said Robert, during all that time, totally lost, and was deprived of the profit and advantage of the said close, to the damage of the said Robert 10*l.* and thereof he brings his suit, and hath good proof of the premises, when the court will consider thereof.

P * 215.

Middlesex. John Saunders, Esq; complains of Sir S. G. bart. Case against and Sir R. D. knight, late sheriff of the county of *Middlesex*, for this the sheriff of *Middlesex*, for not taking sufficient, (*to wit*) that whereas the said John on the 19th day of October, in the year of our Lord 1702. at the parish of St. Clement Danes, cient pledg-

Actions on the Case.

es in re-
plevin.

Danes, in the said county of *Middlesex*, was possessed of a *Bedstead*, a *Bolster*, a *Pillow*, six *Curtains*, (then naming the rest of the Goods) to the value of 200*l.* as of his own goods and chattles: And whereas the said *S.* and *R.* the same Day and Year, were, and long before had been sheriff of the said county of *Middlesex*, and the said *John* being so possessed of the said goods and chattles, they the said *S.* and *R.* being as aforesaid the sheriff of the said county of *Middlesex*, having no regard to the duty of their said office, but contriving, and fraudulently intending to deceive and defraud the said *John* of his said goods and chattles, the same Day and Year, in the said parish of *St. Clement Danes*, in the said county of *Middlesex*, under a colour of their said office, (finding the said goods and chattles at the said parish of *St. Clement Danes*) on a plaint levied by one *W. Presgrave*, who pretended the said goods and chattles were his own goods and chattles, and that they of right belonged and appertained to him; and that the goods and chattles had been taken, and unjustly detained against sureties and pledges, caused the said goods and chattles to be replevied from the possession of the said *J. S.* and to be delivered to the said *W. P.* without having or taking sufficient sureties or pledges, or any sufficient security whatever, for his said *W. P.* prosecuting his said plaint against the said *J. S.* for the supposed taking and unjustly detaining the said goods and chattles, and for making a return of the said goods and chattles to the said *J. S.* if a return of the same should be awarded to him, as by the law and customs of this kingdom of *England*, and the duty of their said office they ought to have done; which said plaint afterwards by due process of law was transmitted into this court of our said sovereign Lord the King, before the King himself, wherefore he should then be in *England*; and whereas also afterwards, (to wit) in *Easter* term, in the sixth year of the reign of his said present Majesty, he the said *John Saunders* was thereupon summoned into this court of our said sovereign Lord the King, before the King himself at *Westminster*, to answer to the said *W. P.* in an action wherefore he had taken the said goods and chattles; and thereupon such proceedings were had, that it was adjudged by the same court at *Westminster*, on due consideration, that the said *J. S.* should have a return irreplegable of the said goods and chattles detained from him as aforesaid, which said judgment is, and now remains in * its full force and virtue not reversed or annulled; and that the said goods and chattles so as aforesaid, delivered to the said *W. P.* by virtue of the said replevin are eloigned and embez- zled away to places unknown, and not to be found, whereby the said *John* cannot have the same returned or delivered to him, and the said *John* on that occasion hath totally lost, and been deprived of his said goods and chattles, and is without any remedy therein to the damage of the said *John* 200*l.* and thereon he brings his suit, and hath sufficient proof of the premises, when the court will consider thereof.

Wilyshire

Actions on the Case.

Wiltshire. Sir Anthony Ashley Cooper, bart. complains of Nicholas St. John, Esq; being in the custody of the marshal of the Marshalsea of our sovereign Lord the King, for this cause, (*to wit*) that whereas the said *A.* on the third day of *August*, in the 18th year of the reign of his present Majesty *Charles* the second, now King of *England*, was, and now is seized in his demesne, as of a fee, of and in a close of pasture containing 124 acres, and of another close of pasture containing 80 acres, situate below the said close, known by the names of the *Purlieu*, otherwise *Russells-Wood*, lying in *Lydiard Millicent*, in the said county; which said several closes were on the third day of *August*, in the said 18th year, and for several years before had been, fenced and hedged about by the said *A. A. C.* for the preservation of the grass respectively growing in the said closes: And whereas the said close of pasture containing 124 acres now is, and for so long a time, that there is no memory of any man to the contrary, hath been near adjoining to a common field called *Purton Common*, on the north east, and north-west parts thereof to another common field known by the name of *Webb's Purlieu*, on the south-west part thereof; and which said common fields lying together, are not separated or divided by any hedges or fences: And whereas the grass respectively growing in the said two closes of the said *A. A. C.* hath yearly, for the space of six years now last past, been valued at 60*l.* of lawful money of *England*; Nevertheless the said *N.* well knowing the premises, but contriving, and maliciously intending totally to deprive the said *A.* of the whole profit and advantage of his said closes, on the third day of *August*, in the said 18th year at *Lydiard Millicent* aforesaid, broke down, and laid to the ground the said hedges, (*to wit*) ten perches of hedge of the said close, containing as aforesaid 80 acres, and from the said third day of *August*, in the said 18th year, until the 13th day of *October*, in the 28th year of the reign of his present Majesty, continued and kept the said hedges thus broken down, and laid to the ground, whereby several cattle, (*to wit*) horses, bulls, oxen, cows, sheep, heifers and calves, of several persons running and depasturing in the said common fields, on the said third day of *August*, in the said 18th year, and at several other days and times, between the said third day of *August* and the said 23d day of *October*, entered out of the said common fields into the said close of pasture, containing as aforesaid 124 acres of the said *A.* through the gaps and open places made by the breaking down, and laying to the ground the said hedges; and the said cattle likewise went and escaped out of that close to and in the said other close of pasture, containing as aforesaid 80 acres of the said *A.* through the gaps and open places made by breaking down, and laying to the ground the hedges aforesaid; and during that time the said cattle fed on, trod down, and consumed the grass of the said *A.* to the value of 300*l.* as aforesaid, respectively growing in the said closes,

Case for breaking down the plaintiff's inclosure, whereby the Cattle of several persons escaped into the plaintiff's closes.

Actions on the Case.

closes, whereby the said *A.* during all that time totally lost, and was deprived of all the profit and advantage of the said closes, to the damage of the said *A.* 500*l.* and thereof he brings his suit, and hath good proof of the premisses, when the court will consider thereof.

Cause against
the master
of a hoy
for falling
foul of, and
sinking the
plaintiff's
boat.

Middlesex. *William Brown* complains of *John Davis*, being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself for this Cause, (to wit) that whereas the said *W.* on the sixth day of *March*, in the fifth year of the reign of his present Majesty at the parish of *Chelsea*, in the said county, was legally possessed of a flat-bottomed boat, as his own boat, then loaden with dung, and riding at anchor in the river of *Thames*, within the said parish; and the said *J. D.* was then and there master and governor of a barge—then sailing in the said river *Thames* within the said parish, towards the said city of *London*; and that the said *J. D.* then and there so carelessly, negligently, and unskillfully managed and governed the said barge, that the said barge, for want of good and sufficient management thereof, then and there violently ran foul of, and rushed upon the said *William's* boat, being loaden as aforesaid, so that the said barge broke and downed the said boat; and the said *William* by reason thereof, not only totally lost the said dung loaden as aforesaid, on board the said boat, but also lost, and was deprived of all the use profit, and benefit of his said boat, for the space of six days then next following, and was likewise obliged to lay out great sums of money in and about getting up, unloading and repairing his said boat; whereupon the said *William* declares that he is injured and endamaged to the value of 30*l.* and therefore he brings his suit, and hath sufficient proof of the premisses, when the court will consider thereof.

Cause for
not putting
out a buoy
to the de-
fendant's
ship;
whereby
the plain-
tiff's ship
ran upon
her anchor.
Mich. 10
W. 3.

Middlesex. *George Harbank* complains of *Matthew Trim*, being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, for this cause (to wit) that whereas the said *George* on the 23d day of *September*, in the year of our Lord 1697, in the parish of *Stepbonheath*, otherwise *Stepney*, in the said county was, and now is, the master of a ship or vessel, called the *Herring*, being then and there in the said river of *Thames*, in the said parish and county; that river then being a navigable river, and the King's common high-way, which said ship or vessel was then and there moored a-shore in the said parish and county. And whereas the said *Matthew*, the same day and year was, and long before had been, and now is, the master of a ship or vessel, called the *Robert and Samuel*, then and there being in the said river, near to the said ship or vessel of the said *George*; and the said *Matthew* contriving, and maliciously intending, greatly to hurt and * injure the said *George*, cast an *Anchor*, with a rope thereto affixed, out of the said ship or vessel called the *Robert*

ACTIONS on the Case.

Robert and Samuel, and so continued the same for the space of thirty-six hours then next following, and did not fix a *Buoy* to the said *Anchor*, to shew where the said *Anchor* was placed; by which the said ship called the *Herring*, afterwards, (*to wit*) the same day and year, in the said parish and county, at the ebbing of the tide, for want of a *Buoy* being fixed to the said *Anchor*, fell foul of the same, in the said river of *Thames*, in the said parish and county, whereby the said ship, by falling foul of the said *Anchor*, through the default of the said *Matthew*, in not having affixed a *Buoy* to the same, was rent and bruised in such a manner, that the said ship was then and there sunk; whereas according to the custom of *England*, used and approved of for so long a time as there is no remembrance of any man to the contrary, all masters of ships, whose ships have been riding at *Anchor* in any navigable river within this kingdom of *England* have used, and during all that time have been accustomed, and ought to fix a *Buoy* to their *Anchors*, which hold their ships; whereby other vessels being in such rivers might by means of such *Buoy* avoid such *Anchors*, so that such other vessels might receive no damage thereby. And whereas the said *George* afterwards, (*to wit*) on the 23d day of *September*, in the said year last mentioned, at the said parish of *Stebonheath*, otherwise *Stepney*, in the said county was, and now is the master of another vessel called the *Herring*, being in the said river of *Thames* in the said parish and county, which said ship was moored a shore in the said parish and county: And whereas the said *Matthew* was likewise then and there the master of another ship called the *Robert and Samuel*, lying in the said river of *Thames*, in the said parish and county, near the said last mentioned ship of the said *George*: Nevertheless the said *Matthew* contriving and intending greatly to damage and injure the said *George*, cast an *Anchor* with a rope fixed thereto out of the said ship called the *Robert and Samuel*, into the said river, and there continued it for the space of twenty hours then next following, and had not fixed a *Buoy* to the said *Anchor* of the last mentioned ship, to shew where the said *Anchor* of the said last mentioned ship of the said *Matthew* was placed, by means whereof the last mentioned ship of the said *George*, afterwards, (*to wit*) on the same day and year, at the parish aforesaid, at the ebbing of the tide, for want of a *Buoy's* being fixed to the said *Anchor*, of the said last mentioned ship of the said *Matthew*, then being in the said river of *Thames* in the said parish and county, fell upon the said *Anchor* of the said *Matthew* last mentioned, placed as aforesaid in the said river of *Thames*, in the said parish and county; whereby the said last mentioned ship of the said *George*, laden with sea-coal, fallen upon the said *Anchor* last mentioned of the said *Matthew*, was, through the default of the said *Matthew*, rent and bruised in such a manner, that the said last mentioned ship of the said *George*, was then and there sunk; whereupon the said *George* declares

Actions on the Case.

declares that he injured and endamaged to the value of 200l. and therefore he brings his suit, and sufficient proof of the premises, when the court will consider thereof.

P* 219.

Cafe by a
passenger
against a
common
carrier for
damages,
in over-
turning his
waggon;
whereby
her collar-
bone was
broke, &c.

* *Middlesex.* Anne Norton complains of Humphrey Paris, being in the custody of the marshal of the *Marshalsea* of our so ereign Lord the King, before the King himself, (*for this cause*) (*to wit*) that whereas the said Humphrey, on the first day of *July*, in the fifth year of the reign of our Lord George the second, King of *Great Britain, and so forth*, was and for several years before had and ever since hath been, and now is a common waggoner, (*to wit*) to carry goods, wares, and merchandizes in his waggon for his said Majesty's subjects for hire, to and from the city of *London*, to the town of *Aylesbury*, in the county of *Bucks*; and whereas the said H. on the said first day of *July*, in the year aforesaid, did, and long before had, and ever since hath been used and accustomed, by him and his servants, to carry and convey several persons, subjects of our sovereign Lord the King, for a reasonable price to be paid him for that purpose, to and fro from the said city of *London*, to the said town of *Aylesbury*, in a waggon of the said Humphrey. And whereas she the said Anne, on the day and year aforesaid, at *London* aforesaid, (*to wit*) in the parish of *St. Sepulchres*, in the ward of *Farringdon* without, at the special instance and request of the said Humphrey, entered into the said waggon, in order to be safely and securely conveyed and carried from the said city of *London*, to the said town of *Aylesbury*, for a reasonable price to be paid by the said Anne to the said Humphrey for that purpose. And the said Humphrey, the day and year last above mentioned at *London* aforesaid, took and received the said Anne into the said waggon, in order to carry and convey her from the said city of *London*, to the said town of *Aylesbury*. Nevertheless the said Humphrey contriving and intending to defraud and injure the said Anne, did not carry, nor convey her from the said city of *London*, to the said town of *Aylesbury*, but the same day and year at *Kensington* in the county of *Middlesex*, drove the said waggon in so careless and negligent a manner, that the waggon was overturned, and thereby the collar-bone of the said Anne was broke, her shoulder-bone dislocated, and her arm very much bruised and bent; whereupon she declares she is injured and damaged to the value of 100l. and therefore she brings her suit, and sufficient proof of the premises, when the court will consider thereof.

SLIPPER

Actions on the Case.

SLIPPER against MASON.

Hilary the sixth of King William the Third. Roll 1203.

Norfolk. Richard Mason, late of *Nackton*, in the said county, Action for
Esq. was attached to answer to *Samuel Slipper*, in an action of an escape
Trespass upon the case, and so forth; and whereupon the said *Samuel*, of a prisoner upon a writ of
 by *William Betts* his attorney, complains, that whereas *George Oxenden*, doctor of laws, the principal official of the gracious excommu-
Oxenden, doctor of laws, the principal official of the gracious excommu-
 court of *Canterbury*, of the arches of *London*, in a certain cause nication.
 upon an appeal and complaint lately depending before him in • 1 Lut. 121.
 judgment, and rightfully and lawfully proceeded on in the same P *220.
 court, (*that is to say*) at *London*, in the parish of *St. Mary le Bow*,
 in the ward of *Cheap*, between *S. Slipper*, the party appellant, and
querelant, and one *W. Dade*, the Appellee and party complained
 against, in a certain ecclesiastical cause, and under the spiritual ju-
 risdiction, (*that is to say*) for subtracting and not paying tithes, in a
 just and lawful manner of proceeding against *William Dade*, by
 reason of manifest contumacy and contempt in not paying the sum
 of four pounds twelve shillings and two pence, of lawful money of
England, the principal sum for tithes, and the sum of seventeen
 pounds of like lawful money of *England*, for expences and costs of
 suit, as well in the first as in the last instances, amounting in the
 whole, to the sum of twenty one pounds twelve shillings and two
 pence, which the said *W. Dade* taking no care to pay, either to the
 said *Samuel Slipper*, or to his proctor within a competent time ap- Or within
 pointed for that purpose, although the said *William Dade* having a compe-
 been then lately admonished, and having been three times fore- tent time
 warned, and for a long and sufficient time expected, pronounced it appointed
 contumacy; and for the punishment of his contumacy, decreed for that
 him to be excommunicated, and in the face of the church, (the due purpose.
 order of law having been first observed in that particular) caused
 and commanded him openly and publickly to be pronounced
 excommunicated; which said premisses, *Thomas* by divine provi- That the
 deuce archbishop of *Canterbury*, primate and metropolitan of all was excom-
England, afterwards, (*that is to say*) on the second day of *October*, in municated.
 the year of our Lord 1697, under the seal of the same court, That the
 signified to our said sovereign Lord the King, in his high court of bishop by
Chancery significavit
 the same to
 the king.

Actions on the Case.

Upon
which a
writ de ex-
communi-
cato capi-
endo issued
out.

That the
sheriff took
him by
virtue of
that writ,
P * 221
and then
let him es-
cape.

Chancery at Westminster, in the said county of *Middlesex*, and such proceedings were thereupon had, that afterwards, (*that is to say*) on the 26th day of *October*, in the ninth year of the reign of his present Majesty, there issued out of the said court of *Chancery at Westminster*, against the said *W.* his Majesty's writ, to take the person therein specified, to be excommunicated, directed to the then sheriff of the said county of *Norfolk*, by which said writ, the said then sheriff was commanded that he should execute justice on the body of the said *William Dade*, according to the custom of *England*, until the said *William Dade* should make satisfaction, as well for the contempt of the holy church, as for the injury committed against the said *S. Slipper*, and in what manner the said sheriff should execute the said writ, he should cause to be known to our said sovereign Lord the King, on the octave of *St. Hillary* then next following, wherever our said sovereign Lord the King should be in *England*, that he might further cause to be done in the premises, that which of right, and according to the statute in that case made and provided ought to be done, and in no wise to omit it; and that he should have there that same writ, which said writ afterwards, and before the said octave of *St. Hillary*, (*that is to say*) in the term of *St. Michael* in the said year, was delivered to the said *Richard* (he then being sheriff of the said county of *Norfolk*) to be executed in due form of law, by virtue of which said writ, he the said *Richard Mason*, afterwards, and before the return thereof, (*that is to say*) on the first day of *December*, in the said ninth year, took and arrested the said *William* by his body, at *Catton* in the said county of *Norfolk*, and had and detained him there in his custody until the said *Richard * Mason* contriving and maliciously intending to deprive the said *Samuel* of his remedy, for the obtaining the said sums of money afterwards, (*that is to say*) on the first day of *January*, in the said ninth year, permitted the said *William* to escape and go at large where he pleased at *Catton* aforesaid, without any authority whatsoever, and without the leave of any bishop or archbishop, and without the leave, and against the will of the said *Samuel*, or without any security whatsoever given, to obey the commands of the church in due form of law; (the said *Samuel* then, or yet not having had any satisfaction for the said sums of money, or any part thereof) and the said *William* hath ever since withdrawn himself to places unknown to the said *Samuel*; and by reason of the premises, he the said *Samuel* is defrauded from all manner of relief in obtaining the said sums of money, to the damage of the said *Samuel* 50*l.* and therefore he brings his suit, and so forth.

This action after several exceptions in arrest of judgment was held would lie; and for maintenance thereof the following cases were cited.
F. N. B. 47 b. Hob. 317. 3 Cro. 838. 1 Lev. 192. 1 Keb. 947. 1 Cro. 291. 1 Rolls Abr. 110. 5 Co. Williams's case. 2 Jones 132. Moor 648. 3 Cro. 652. & 877. 2 Bullst. 236. Moor. 334.

PALGRAVE,

Actions on the Case.

PALGRAVE, Bart. against WINDHAM, Esq.

Norfolk. Francis Windham, late of Cromer in the said county, Case on the
Esq. was attached to answer to Sir Richard Palgrave, bart. adm- statute of
nistrator of all the goods and chattels which were the lady Anne the 8th of
Palgrave's, his deceased mother, who died intestate, in an action of Queen
trespass upon the case, and so forth: And whereupon the said Richard Anne, for
by Thomas Hare his attorney, complains, that whereas by a sta- better secu-
tute published in the parliament of our late sovereign Lady Anne, rity of
late Queen of Great Britain, and so forth, held at Westminster, in the ren's, and
county of Middlesex, on the 18th day of July, in the eighth year of preventing
her reign, (amongst other things) it was enacted by the authority frauds by
of the said parliament, "that from and after the first day of May, tenants.
"which should be in the year of our Lord 1710, no goods or chat-
"tels, whatsoever lying, or being in or upon any messuage, lands
"or tenements, which were, or should be demised for term of Recital of
"life, of years, at will, or otherwise, should be liable to be taken the said act.
"by virtue of any execution, or extent, or upon any pretence
"whatsoever, unless the party at whose suit the said execution
"should be prosecuted before the removal of such goods from off
"the said premises, by virtue of which execution or extent, should
"pay to the landlord of such premises, or his bailiff, all such sum
"or sums of money, which were, or should be due for rent of the
"said premises, at the time of taking such goods and chattels, by
"virtue of such execution, provided that the arrears of rent did
"not exceed upwards of a years rent and in case the arrears
"should exceed a years rent, then the said party, * at whose suit P * 222.
"such execution should be prosecuted, paying to the said landlord,
"or his bailiff a years rent, should proceed to the execution of the
"said judgment, as he might have done before the making of the
"said act." And the sheriff and other officer by the said act
was to have power, and was required to levy and pay to the plain-
tiff, as well the said money so as aforesaid paid for rent, as also
the money in the said execution, as by the said statute in that case
made and provided, may (amongst other things) more fully and at
large appear. And whereas the said Lady Anne Palgrave, after
the making the said act, (to wit) on the 16th day of June 1712, That the
had demised, and to farm letten, to one David Cook, two messuages, intestate
and 120 acres of land, with the appurtenances situate, lying and be- demised at
ing in Norwood Birmingham, Town Birmingham, and Bodham, in will,
the

Actions on the Case.

the said county of *Norfolk*, for him the said *David*, and his assigns, to hold, &c. to have and occupy from the feast of *St. Michael*, then last past, to the full end and term of one whole year from thence next ensuing, paying, &c. and fully to be compleat and ended; and so from year to year as long as both parties should please, paying for the same yearly, as long as the said *David* should occupy the said two messuages and 120 acres of land, with the appurtenances, to the said Lady *Anne*

Entry of the tenant,

who held it for two years, and 70l. for one year's rent was in arrear.

That the defendant, by virtue of a writ of *Fieri Facias*,

and a warrant from the sheriff,

took the goods and chattels.

That the intestate gave the defendant notice of the rent.

P * 223.
The breach.

Palgrave, her heirs and assigns, the rent or sum of seventy pounds of lawful money of *Great Britain*, to be paid at the feasts of the annunciation of the blessed *Virgin Mary*, and *St. Michael* the archangel by equal portions; by virtue of which demise, the said *David* entered into the said two messuages, and 120 acres of land, with the appurtenances, and was possessed thereof, and occupied the same for the space of two years, and 70l. of the said rent was due in arrear and unpaid to the said Lady *Anne*, for one whole year, ending at the feast of *St. Michael* the archangel, in the year of our Lord 1713. And whereas afterwards, (to wit) on the sixth day of *October*, in the 12th year of the reign of her said late Majesty, at *Norwood Birmingham* aforesaid, (he the said *Francis* then, and now being chief bailiff of the dutchy of *Lancaster*, in the said county) by virtue and means of a writ of *feri facias*, on the lands and chattels of the said *David*, prosecuted out of her said late Majesty's court of common pleas, (the same court then being at *Westminster*, in the county of *Middlesex*) at the suit of *Erasmus Buck*, against the said *David Cook*, upon a judgment before had and obtained against him in the said court of common pleas, and directed to the then sheriff of the county of *Norfolk*; and by virtue of a warrant in writing from the said sheriff, sealed with his seal, directed to the said *Francis Windham*, he the said *Francis* within the said liberty, (to wit) at *Norwood Birmingham* aforesaid, took the goods and chattels of the said *David Cook*, that then were in and upon the said messuages and lands, with the appurtenances, to the value of 200l. And the said *Richard* further says, that after the taking, and before the removal of the said goods and chattels, by means of the said warrant, (to wit) the same day, year, and place last abovementioned, she the said Lady *Anne Palgrave*, in her life-time, gave notice to the said *Francis* of the said rent due to her as aforesaid; and the said Lady *Anne*, then and there demanded the said rent of the said *Francis*, *which he the said *Francis* then and there refused to pay out of the said goods and chattels. And so it was that the said *Francis* not considering the said statute, or in any wise fearing the punishment therein contained, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *Anne* in her life-time, and the said *Richard*, after the decease of the said *Anne* in this particular, although often requested, hath not paid to the said *Anne*, or to the said *Richard* after her decease, the said 70l. being in arrear and unpaid to the said *Anne* as aforesaid, for the said rent

Actions on the Case.

for one whole year, ending at the feast of St. *Michael* the archangel, in the year of our Lord 1713, nor made any satisfaction for the same; but the said *Francis* afterwards, (to wit) on the sixth day of *October*, in the said 12th year of the said late Queen, took, carried away, and removed off and from the said tenements the said goods and chattels taken by means of the said warrant, and hath hitherto refused to pay the said rent, or make any satisfaction for the same, either to the said *Anne* in her life time, or after her decease to the said *Richard* (to whom administration of all and singular the goods and chattles, which were the said Lady *Anne's* at the time of her death, by *Thomas Tanner* doctor of divinity, lawfully constituted principal official to *Charles* lord bishop of *Norwich*, was on the 11th day of *June*, in the year of our Lord 1716, at *Norwood Birmingham*, aforesaid, granted in due form of law) and the said *Francis* still doth refuse to pay to the said *Richard* the said 70l. or to make him any satisfaction for the same, to the damage of the said *Richard* 100l. and thereof he brings his suit, and hath good proof of the premises, when the court will consider thereof; and he brings here into court the said letters administrative, which testify the said commission of administration to the said *Richard*, in the manner as above set forth, and so forth.

GORAM against SWEETING.

Michaelmas the Twenty Second of King *Charles* the Second.
Roll 367.

London. *Francis Goram* complains of *John Sweeting*, being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, for this cause, (*that is to say*) That whereas the said *Francis*, on the 20th day of *April*, in the year of our Lord 1669, at *London* aforesaid, in the parish of *St. Mary le Bow*, in the ward of *Chesop*, according to the usage and custom of merchants, caused to be made and written a policy of insurance, in which written policy it is mentioned, that the said *Francis Goram* made an assurance, and caused himself to be assured, lost or not lost, from *London* to any ports, and places out of the streights of *Gibraltar*, at, to and again, up and down from port to port, and from place to place, in trade, and at and from thence to *London*, upon the tackle, furniture, ordnance, artillery, boat, and other furniture, of and in the good ship called the *Margaret* of **London*,

^{a Saund.}
200.
A declarati-
on upon a
policy of
insurance.

Reciting
the policy.

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150 ton or thereabouts, whose master, under God, for that voyage, was *Henry Fairweather*, or whosoever should go for master in the said ship, or by whatsoever name or names the said ship or master should be named or called, beginning the adventure upon the said ship, *and so forth*, from and immediately following the date of the said writing, and should so continue and endure, until the said ship should be arrived to any port or place whatsoever, out of the streights of *Gibraltar*; and during the said time of her abode, and stay there, at, to and again, up and down, from port to port in trade, from place to place, upon the said ship, *and so forth*; and further until the said ship, together with all her said tackle, ordnance, *and so forth*, should be landed at *London*, and there moored at anchor twenty four hours in good safety; and by the said writing it was agreed, that the said ship, *and so forth*, for so much as concerns the insured was, and should be at all times during the said voyage, rated and valued at the full sum of 300*l.* sterling, without rendering any further account for the same, for the adventures and perils which the said assurers were content to undergo, and had undertaken the said voyage, were they of men of war, fire, enemies, pirates, rovers, jettizons, letters of mart and counter-mart, captions and seizures upon the sea, arrests, restrictions or detentions of all Kings and people, of whatsoever names, condition, or quality, barrety of master and mariners, and of all other dangers, damages and misfortunes, which had and should happen to the hurt, detriment or damage of the said ship, tackle, *and so forth*, or of any part thereof; and in case of any misfortune, it should be lawful for the assured, their factors, servants, and assigns, to sue for, labour, and travel, in and about the defence, safety and recovery of the said ship, *and so forth*, or of any part thereof, without prejudice to the said assurance; to the cost of which, the said insurers would each of them contribute, according to the rate and quantity of his sum in the said assurance; and in this manner the said assurers were content, and by the said writing, promised and obliged themselves, each for his own part, their heirs and executors, and their goods, to the assurers, their executors, administrators and assigns, for the true performance of the premises, confessing themselves to be paid the consideration due to them for the assurance by the said *Francis Goram*, according to the rate of 3*l.* 12*s.* per cent. for six months, and according to that rate monthly, afterwards, and to the end of the said voyage, until intimation should be given for discharging the said adventure. And the said *Francis Goram* saith, that after the writing, and making of the said policy, (*to wit*) on the 18th day of *November*, in the year of our Lord 1669, at *London* aforesaid in the said parish and ward, the said *John Sweeting* had notice of the said policy; and thereupon the said *J. S.* on the said 18th day of *November*, in the said year last above mentioned, at *London* aforesaid, in the said parish and ward, in consideration, that the said

Francis

Mutual
promises.

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Francis Goram, then and there agreed with the said *J. S.* to pay to the said *J. S.* according to the rate of 3l. 12s. per cent. for six months, beginning the said adventure from the 21st day of *August*, the said year, and to perform all and singular the other matters and things contained in the said policy, on the part of the *assured, to be performed for the insurance of 50l. to be made by the said *J. S.* according to the tenor of the said policy; he the said *J. S.* then and there agreed and was content with the said policy of assurance, beginning the said adventure from the said 21st day of *August*, in the year last above mentioned, (the ship then being in good safety) according to the tenor and good intent of the said policy; and the said *J. S.* in consideration of the premises, then and there undertook, and faithfully promised the said *Francis*, that he the said *J. S.* for his part, would well and truly perform all the premises contained in the said policy, on the part of the assured to be performed, as to the fifty pounds, beginning the said adventure, from the said 21st day of *August*, in the year last above mentioned, (the said ship being then in good safety; : And the said *Francis* in fact says, that the said ship, on the 21st day of *August*, in the year last above mentioned, was in good safety, (to wit) at *London* aforesaid, in the said parish and ward; but that the said ship, tackle, ordnance, artillery, boat, and other furniture, or any part thereof did not land, or arrive in good safety, from the said voyage at *London* aforesaid, but afterwards, (to wit) on the 25th day of *November*, in the year of our Lord 1669 aforesaid, making her said voyage beyond sea, towards *London* aforesaid, being upon the high seas, out of the streights of *Gibraltar*, the same were drowned and destroyed through the perils of the sea, and by the violence of the wind and storms, (to wit) at *London* aforesaid, in the said parish and ward; whereupon afterwards, on the 11th day of *November*, in the 21st year of the reign of his present Majesty *Charles* the second, King of *England*, and so forth, the said *Francis* gave notice thereof to the said *John Sweeting*, at *London* aforesaid, in the said parish and ward, and then and there, according to the custom of merchants, renounced to the said *John Sweeting*, and the other assurers subscribing the said policy, all his interest in the said ship, and the other premises assured as aforesaid; and then and there requested the said *John* to pay to the said *Francis*, the said 50l. assured as aforesaid by the said *John Sweeting*, which he the said *John* ought to have paid to the said *Francis* by reason of the premises, and according to the custom of merchants. Nevertheless the said *John Sweeting* having no regard to his said promise and undertaking, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *Francis Goram* in this particular, did not undergo the adventure of the said ship, tackle, ordnance, artillery, boat, and other furniture, drowned and destroyed as aforesaid, or any part thereof as to the said 50l. nor hath yet paid to the said

P * 225.

Averment, that the ship was in good safety at the time of the policy.

That she was drowned with all her tackle, &c. on the high seas out of the streights of *Gibraltar*.

That the plaintiff renounced all claim to the said ship, &c.

The breach.

Francis

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Francis the said 50*l.* or any part thereof, or as yet in any wise made him satisfaction for the same, although the said *John Sweeting* afterwards, (*to wit*) on the first day of *March*, in the 22*d* year of the reign of his said present Majesty, was by the said *Francis Goram* often requested so to do at *London* aforesaid, in the said parish and ward; whereupon the said *Francis* declares, that he is injured and endamaged to the value of 100*l.* and thereof he brings his suit, and hath good proof of the premisses, when the court will consider thereof.

P*226. * And now at this day, (*to wit*) on *Monday* next after three weeks from *St. Michael*, this same term, (to which day the said *John Sweeting* had leave to imparle to the said bill, and then to answer, and so forth,) as well the said *Francis Goram*, by his said attorney, as the said *John Sweeting* by *Basil Herne* his attorney, are come before our sovereign Lord the King at *Westminster*; and the said *John* defends the force and injury, when, and so forth, and saith, that the said *Francis Goram* ought not to have and maintain his said action thereof against him; because he saith, that the said ship, tackle, ordnance, artillery, boat, and other furniture aforesaid, after the making the said policy, and before the day of exhibiting the said bill, (*to wit*) on the 20*th* day of *July*, in the 22*d* year of the reign of his said present Majesty, landed and arrived at *London*, (*to wit*) in the parish of *St. Maryle Bow*, in the ward of *Cheap*, in good safety, from the said voyage; and the said ship with all her said tackle, ordnance, and so forth, was there moored at anchor twenty four hours in good safety, without that, that the said ship, tackle, ordnance, artillery, boat, and other furniture, was drowned and destroyed in the said voyage, in such manner and form as the said *Francis* hath above alledged; and this he is ready to verify; wherefore he prays judgment, whether the said *Francis* ought to have and maintain his said action against him, and so forth.

Demurrer. And the said *Francis* saith, that he ought not to be precluded from having his action thereof against the said *John*, by reason of any thing above alledged by the said *John* in his plea, because he says, that the said plea, in the manner and form, as the same is above pleaded by the said *John*, and the substance therein contained, are in law insufficient to preclude the said *Francis*, from his having the said action thereof against the said *John*, to which plea the said *Francis* is under no necessity, or in any wise bound by the law of the land to make answer; and this he is ready to verify; whereupon, for want of a sufficient plea in this particular, the said *Francis* prays judgment, and that his damages occasioned by the premisses may be awarded to him, and so forth, and for causes of demurrer in law to the said plea, he the said *Francis*, according to the for of the statute in that case made and provided, shews to, and lays before this court of our sovereign Lord the King this following reason,

That the ship, &c. arrived in safety, and traverse that the ship, tackle, &c. were all drowned.

Actions on the Case.

reason, (*to wit*) for that the said plea is argumentative, negative pregnant, uncertain, and defective in form.

To which there was a *joinder in demurrer*, and judgment for the plaintiff. 2 Saund. 205.

The *objection* that was taken on behalf of the plaintiff, was to the *traverse* in the defendant's plea; for as it was taken, if any of the things therein enumerated arrived in safety, as if the ship itself was safely landed, and all the goods and merchandizes, and all the tackle, ordnance, &c. had been lost, whereby, according to the policy, the plaintiff ought to have had satisfaction; yet if the *issue* had been taken upon the defendant's *traverse*, it would have been against the plaintiff; and this action being only for *damages*, according to the loss that the plaintiff had sustained, every part ought to have been put in *issue*; but here unless the plaintiff proves that the ship, and all the other things are lost, he will recover for no part; and if the defendant proves, that a cable, or an anchor, arrived in safety, he would be acquitted of the whole, if the plaintiff had taken *issue* on that *traverse*. P. * 272

But it was argued by the defendant's counsel, that in this policy there were two *clauses*; *First*, that if the ship, or tackle were damaged, the plaintiff might labour to save them, and the defendant was to pay his proportion of the charges of it. *Secondly*, that if the said ship, goods, and so forth, should be totally lost, then the defendant was to pay the 50*l*. and here the plaintiff hath averred a total loss of the ship and goods, for which he demands the 50*l*. and the plaintiff having averred in the copulative, that the said ship, tackle, ordnance, artillery, boat, and other furniture, were totally lost, he hath thereby given advantage to the defendant to *traverse* it precisely as he alledged, and that he ought not to recover damages on this breach; but notwithstanding what was alledged by the defendant's counsel, the court were of opinion for the plaintiff, and said, the defendant might prove, that so much and no more were lost, in mitigation of damages upon the *writ of enquiry*; and the cases in the margin of the book are as follows. S. C. 2 Keb. 717, 722. *vide Molloy, Lib. 2. 7.* 3 Lev. 320. 4 Mod 58. 1 Show. 320. 2 Salk. 443. *vide 2 Salk. 361, 629, 640.* Vaug. 15, 16, 17. Ray 199. 1 Vent. 101, 127. 1 Lev. 192. 2 Lev. 112. 1 Saund. 307, 267, 312. 1 Mod. 72. 2 Show. Pal. 380, 381. Hob. 103. 2 Saund. 180, 181, 295. 1 Lev. 58. 2 Sho. case 42, 82. N. Lut. 247. 10 Co. 116, 117. 4 Co. 5, 6, 7. Ante 2, 6, 17. Post 379. Post 282.

VOL I.

T

TURBERVIL

Actions on the Case.

TURBERVIL against STAMP. 2 Salk. 724.

Case for not
keeping of
the defen-
dant's fire
carefully,
whereby
the plain-
tiffs furze
was burnt
and de-
stroyed.

Dorsetshire. *Thomas Turbervil, Jun. Esq.* complains of *John Stamp, gent.* being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, for this cause, (*to wit*) that whereas according to the law and customs of this kingdom of *England*, hitherto used and approved of, every man of this kingdom, by day and night, is bound to keep his fire safely and securely, lest for want of due care of such fire, any damage might any wise happen to any person of the same kingdom. And whereas the said *Thomas* on the sixth day of *April*, in the ninth year of the reign of our sovereign Lord, *William* the third, King of *England*, and so forth, was possessed of a close of furze ground, lying and being in the parish of *Stoke*, in the said county; and whereas the said *John*, on the day and year abovesaid, was likewise possessed of another close of furze next adjoining to the said close of the said *Thomas*, in the said parish and ward; he the said *John*, the day, year and place above mentioned, so *negligently and carelessly kept his fire in the close of furze of the said *John*, that for want of due care of the said fire, the said furze of the said *Thomas* then growing, and being in his said close was burnt down and consumed, to the great damage of the said *Thomas*, and contrary to the said custom; whereupon he declares he is injured and endamaged to the value of 40*l.* and thereof he brings his suit, and hath good proof of the premisses, when the court will consider thereof.

P* 328. After a verdict it was objected, that the custody extends only to fire in his house or curtilage, which may be said to be in his power; but it was answered by the court, that the fire in his field, is as much his fire, as that in his house; and as he made it, he must see it does no harm, or answer the damages if it does.

***Readings and Observations on Actions upon the P *229.
Case, together with an Abridgment of the Cases in the Reports.**

ACTIONS on the case are to be brought, for a satisfaction in damages for injuries done to man, either with respect to his own person, or the persons of those in whom he has an interest, and for injuries done to his property, or to the property wherewith he is intrusted by law for the benefit of others.

Actions on the case which relate to his own person, or the persons of those in whom he has an interest, and so relate to him by consequence, are, first, for injuries that immediately deprive him of his liberty wrongfully; as for procuring him to be imprisoned without a cause, or which tend to deprive him of his life or liberty, or to bring him under some corporal or pecuniary punishment, charging him with the breach of some positive or penal law.

Secondly, By slandering him in his good name and reputation, whereby he may lose the conversation and acquaintance of the sober part of mankind, or otherwise slandering him in his trade or profession, tending to deprive him of the means of getting his livelihood, or in his office or dignity, or both; and that by words, or writing, the contents whereof are pernicious slander.

Thirdly, For beating or hurting his servant, thereby disabling him to do his work. *Brownl. 205. Yelv. 89, 90.*

As if a man sends his servant of an errand, and a person digs a pit in his way, into which the servant falls and hurts himself, the master may bring this action. *2 Bulstrode 334.*

Actions upon the case for injuries relating to a man's property may be thus considered; That as a man is capable of acquiring property, so he hath by law a right to have it preserved to him; and the law with regard to the preservation of property, hath these three following rules relating thereto.

First, That no man is to deprive another of his property, or wilfully to do a damage thereto, nor disturb another in the enjoyment thereof.

T 2

Secondly,

Readings and Observations.

Secondly, Every man by the rules of law is bound to take due care and preserve his own property, so as the neglect thereof may not tend to injure his neighbour.

Thirdly, Every man is so to use and enjoy his own property, that he does not, in the manner of his use and enjoyment thereof, do a damage to the property of his neighbour.

Under the first of these fall actions of trover, and for disturbances and other wrongs, which work an injury by maleseazance. Under the second of these naturally follow actions for not repairing a partition-wall, fences, and such like. And under the last of these will follow such as arise from a man's misuse of his property; as if a man builds a house upon his ground, he must not build it in such a manner as to destroy the ancient lights of his neighbour; nor can he make dams in his own ground, whereby the water overflows the fields of another person; or make a drain in his own ground, which carries filth or noisome soil into another's yard; and there are a multitude of another injuries that arise from the breach of this rule, for which this action may be brought.

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And as a man is capable of acquiring property, so is he of making contracts relating thereto, and the law wills, that every man should perform his word and contract with another, so far, as it is to do and perform that which is right and just.

And every contract is defined to be *quasi actus contra actum*, and therefore in every contract there must be *quid pro quo*. 1 Co. Inst. 47. b.

Which word *quid* signifies the consideration or ground for the *quo* or the promise; and the breach of that purpose made upon a good consideration, is the foundation of the party's complaint, and with respect to actions founded upon contracts, see more hereafter under the title *actions upon the case* for not performing of promises.

And here it is to be observed, that as laws are the sinews of government, and the very hinges or cements of society, it is the duty of all those that are in office, and have the execution of the laws, that they execute their offices duly and uprightly, and according to the tenor of those laws, with the execution of which they are so intrusted; and under this head will properly fall such actions as lie against sheriffs, and such other officers, for wrongs and injuries arising from the undue execution of those laws that they are entrusted to execute.

And as such officers are duly and uprightly to execute such laws; so are they not to be molested or hindered therein, or any ways prevented from the due execution thereof by force or fraud, or in any other manner howsoever; if there are, the person so offending is liable to render a satisfaction in damages for the same; under which head may be reckoned actions of rescue, escape, &c. or for disturbance

on Actions on the Case.

disturbance of such officers in the execution of their respective offices, and such like in any manner howsoever.

Another species of this action, is that which arises from the duty and obligation incumbent upon all persons of any trade or profession whatsoever, to act therein according to the rules of justice.

For as officers entrusted with the laws relating to the publick, are to carry themselves justly and uprightly ; so every man, of what trade, art, mystery or profession soever, is to exercise such trade, art, mystery and profession, with due care, diligence and industry, and without fraud or deceit ; so that he neither wilfully, negligently, or fraudulently exercise such trade, art, mystery or profession, to the damage of any person whatsoever, who has entrusted any thing to his care in his profession, or deals with him in buying and selling ; and under this head will naturally follow actions against attornies, apothecaries, carriers, innkeepers, smiths, and all others of any trade, art, mystery, or profession, who fraudulently, wilfully, or negligently exercise their trade or employments, to the injury and damage of such person so employing or trading with them.

Another species of this action is for not performing of contracts, or doing injuries to another that do not immediately relate to his own property, but to the property with which he is entrusted for the benefit of others, at those actions which may be brought by and against executors or administrators.

And having here laid down the manner, in which actions upon the case are intended to be treated of, what is here said before, is only intended that the reader might have a clear perception of every particular subject that follows ; and the cases in the books are placed and distributed under the following heads.

First, Of actions for falsely and maliciously prosecuting the plaintiff without a cause, or causing him to be indicted for a crime supposed to have been done against some possible or penal law.

Secondly, Actions for slander, whether it be relating to his good name and reputation only, or to his trade or profession, tending to deprive him of the means of getting his livelihood ; to his office or dignity, or title to lands Vide page 239.

Thirdly. Of actions upon the case for not performing of promises. p. 286.

Fourthly, Of actions of deceit upon warranties, &c.

Fifthly, Of trover and conversion. p. 345.

Sixthly, Of actions upon the case for wrongs by nuisances and annoyances. p. 398. By disturbances p. 404. By negligence. p. 405.

Seventhly, Of actions against officers for the undue execution of their respective offices. p. 409.

Eighthly,

Readings and Observations

Eighthly, For disturbances of officers in the due execution of their offices, or for doing somewhat whereby they are prevented from the due execution of the laws. p. 413.

Ninthly, Of actions against attornies, apothecaries, carriers, inn-keepers, smiths, and all other people of what art, trade, mystery, or profession whatsoever; for the fraudulent, wilful, or negligent exercise of their profession, trade, art or mystery, to the injury and damage of another. p. 414.

Tenthly, For damages to be recovered by and against executors and administrators. p. 441.

And first, *For falsely and maliciously indicting or prosecuting the plaintiff without a cause, or imposing some crime upon a man, supposed to have been done or committed against some positive or penal law.*

Plt.
1 The proper action for an imprisonment that is unlawful and cannot be warranted is an action of trespass; but if a man be imprisoned for a large sum when there is but a small one due, on-purpose maliciously to prevent the party from procuring bail, then an action upon the case may be brought against the bailiff in the action who caused the party to be so maliciously detained. *Robins v Robins.* 1 Salk. 15.

2. The injury for which this action may be brought for charging a person with crimes done against some positive or penal law, may be done by several, or by one person only; if by several, and there are all the necessary requisites to make it a conspiracy, then the party injured may have a writ of conspiracy, or this action, in the nature of a conspiracy.

3. And there is some difference between an action of conspiracy and an action upon the case, in favour of the latter, that is most generally used, and most eligible where it may be had. For in an action of conspiracy it is so far material, that there are more than one to participate of the offence; that if the writ be brought against several, and all but one are acquitted, there can be no judgment against the other. *New Nat. Brew.* 114, 116. *Bro. Conspiracy*, 21. *Bend.* 138. and if the action be brought against two, the acquittal of one is the acquittal of the other. *Cro Eliz.* 701.

4. And it cannot be brought against the husband and wife, because in the eye of the law, they are but one person to this and several other purposes. *Palmer* 25. *New Nat. Brew.* 265. 38 E. 3. 40 E. 3. 19. b.

5. And in that action, the party who brings it must be indicted, arraigned and acquitted; and it is part of the writ itself, that he was *legitimo modo acquietatus*. 9 Co. 56. *New Nat. Brew.* 260.

6. And it is expressly said, in 9 E. 4. 12. that the party must have been acquitted on a good indictment, or else he shall not have that action, and that it is a good bar to say that the indictment was insufficient.

7. Therefore

on Actions on the Case.

7. Therefore the action upon the case, (requiring none of these qualifications, if there are others sufficient to ground the action) is generally chosen; and I shall confine myself to the cases on this head, and only take notice, that this action is alike to the other in these two instances, *viz.*

That the prosecution, which is charged upon the defendant to be the ground of the plaintiff's action, must be,

First, *Voluntary.* Secondly, *Malicious.*

First, As to its being voluntary, it is to be observed that this action hath been held not to lie against a witness who comes into a court, and gives evidence against the defendant, or by the command of the justices, or some of them, draws or procures to be drawn an indictment against any one; or if being bound to prosecute, or to give evidence, he does so, though his evidence is false. 27 Hen. 6. 12. 35 Hen. 6. 14. 27 Hen. 8. 8.

But where it appears that a witness is officious, and brings an indictment ready drawn to the court, that is an evidence of its being voluntary and malicious. 1 Leon. 107. Cro. Eliz. 70, 134. *Knight and Jermin.*

Secondly, As to its being malicious, it is here to be considered what are the marks whereby the malice may be known and distinguished. Where a party prevails upon a justice not to hold a man to bail in a matter on which he had brought the plaintiff before him, and the justice thereupon commits the plaintiff to prison, for a matter that was bailable, and good bail was tendered, this is a sufficient mark of malice in the prosecutor. *Muriel ver. Tracy*, 6 Mod. 169.

But where the father indicts a man for a rape upon his daughter who is an infant, and tells him the party prosecuted was the person, this shall be a sufficient excuse to the party prosecuting. *Cox ver. Worrall*, 2 Cro. 193. *Telv.* 103.

And if there is a real felony committed, and there are circumstances happen to concur, which leave more room for a suspicion of the person prosecuted, than of any other, that shall be a sufficient excuse to the party prosecuting, *Weale ver. Wells*, 3 Bulst. 284. as where the steers, which were stolen from the defendant, were found in the plaintiff's possession.

*It has been said, that the accusation must be false as well as malicious; but that does not hold in every case, though it has been said to hold where the plaintiff was charged with treason or felony, or crimes of the like nature; yet in an indictment for an assault or trespass, where the prosecution was plainly malicious, it is not necessary that the matter of the prosecution was absolutely false.

But it may not be improper to take notice, that a civil action differs very far from an indictment. For in that the defendant has his costs,

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costs, and at common law the plaintiff was amerced *pro falso clamore*, for the estreats of which amerciaments, warrants were constantly delivered to the coroners, who by a jury asseer'd them according to the malice or vexation of the plaintiff; also in civil actions, the plaintiff asserts a right, or complains of an injury, and therefore to bring an action, tho' there be no good ground, is not actionable, because 'tis a claim of right, and the plaintiff in such action has found pledges, and is amerciable *pro falso clamore*, and is liable to costs; but yet if one has a cause of action for a small sum, and takes out a *latitat* for a very great sum, or has no cause of action at all, and yet maliciously sues the plaintiff, to the intent to imprison him for want of bail, or do him some special prejudice, an action of the case lies; but then 'tis not enough to declare generally, that he brought an action against him *ex malitia & sine causa, per quod* he put him to great charge, &c. but he must shew the grievance specially as in 1 *Sid.* 424.

So whereas the plaintiff owed the defendant 100*l.* he sued him for 500*l.* and to hinder him from bail affirmed to the sheriff 500*l.* was due, *per quod* he was imprisoned for want of bail, 1 *Saund.* 228. or for that the defendant intending to procure his imprisonment, where there was no cause of action, or without any cause of action sued him in an action for 300*l.* whereupon he was arrested, imprisoned, &c. And yet if one that is not concerned, but a stranger, procures another to sue me without a cause, I may maintain an action against him generally. *Vide N. B.* 98. 2 *Inst.* 544. 3 *Cro.* 371.

2. If a man be falsely and maliciously indicted of any crime, that may prejudice his fame and reputation, he may bring his action, for he is falsely and scandalized by the malice of the prosecutor; and this is a damage for which the law gives an action. 1 *Sid.* 46. *Tel.* 15. *Lut.* 122.

So if a man be falsely and maliciously indicted of a crime, that subjects him to the peril of life or liberty, and for which he may be punished, he may bring his action; for he is endangered in this respect, and receives a damage, for which the law gives an action. So if a man be falsely and maliciously indicted, though it neither touch his fame nor liberty; for it is injurious to his property in putting him to a needless expence, and a damage to one's property will maintain an action, as well as a damage to his fame or Person. *Vide 3 Edw.* 3. 19. 3 *Aff.* 1. 7 *H.* 4. 31. 11 *H.* 7. 25, 26. *N. Br.* 106. *Stile* 379.

3. Where a man is falsely and maliciously indicted of a crime which hurts his fame, and which is a scandal to him, though the indictment be insufficient, or an *ignoramus* found, yet an action lies for the slander, because the mischief of that is effected. So it is, if it endangered his liberty, and he was actually imprisoned; otherwise where it only concerns his property, for he cannot suffer that in either of those cases.

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But though the action does lie, yet it is said it ought not to be favoured; and therefore 1st, If the indictment be found by the grand Jury, the defendant shall not be obliged to shew a probable cause, but it shall lie on the plaintiff's side to prove express rancour and malice. 2^{dly}, If *ignoramus* be returned where an indictment contains no scandal, or the party has not been imprisoned, no action lies; otherwise if it contains a scandal, or the party has been imprisoned, but then there must be evidence of express rancour and malice; for innocence is not sufficient. 1 *Salk.* 15. P *234.

Note; It is said in this very case, reported in 5 *Mod.* 394. that it must be admitted, if the indictment be not good, the action will fail, because the party is not *legitimo modo acquietatus*, and this upon the authority of 2 *Inst.* 385. but it was resolved by my lord chief justice *Parker*, as mention'd in the margin of the report in 1 *Salk.* 15. and by the whole court, upon great consideration, that there was no reason of this diversity between a malicious prosecution upon a good indictment, and upon a bad one; and that this action will lie for damages, for expences, and scandal or imprisonment, though the indictment be insufficient. *Hill.* 12 *Annæ*, *Jones* against *Gwyn*, entred of *Trin.* 11. of the same Queen. *Roll.* 326. *Carthew.* 416.

So that the case of *Agard* and *Wild*, and others in *Bridgman* 132. seems not now to be Law, where it was said, that if an indictment be insufficient, although the party pleads not guilty, and is acquitted, yet he shall not have a writ of conspiracy, or an action upon the case, in the nature of a conspiracy; for by such indictment he cannot be in any danger. 9 *Edw.* 4. 12.

The Several Cases under this particular Head are distributed in this Order.

First, Where the Action has been held to be Good, and where not.

Secondly, Where and when the Action must be brought.

Thirdly, By and against whom.

Fourthly, Of the Declaration.

Fifthly, Of the Justification and other Pleadings.

Sixthly, Of the Judgment, Writ of Inquiry of Damages and the Execution.

First, Where the Action has been held to be Good, and where not.

1. Where the father prosecuted the plaintiff on suspicion of a rape on his daughter, was held not to be malicious, and gave no cause

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cause of action, what would have made the action good, *see Cox ver. Worrall*, 2 *Cro.* 193.

2. Where a complaint to a justice of peace, and his binding to prosecute, and the party acquitted was held to give no cause of action. *Mackinton ver. Allen*, *Winch* 73.

3. Where it was held, that if the indictment is preferred by the party aggrieved, and he pursues it according to Law no action lies, yet if malice appears it will. *Knight ver. Fermin*, 1 *Cro.* 70, 134.

4. Where it was held that an action would not lie against an attorney for suing the plaintiff in an inferior court. *Anonymous*, 1 *Mod.* 209.

5. Where it was held that an action would lie for arresting a man for 500*l.* and holding him to bail when there was but 200*l.* due; the same point in *Stribber* against *Johns* and *Waters*. 1 *Mod.* 4. 2 *Keb.* 546, 547. *Dowse ver. Swain*. 1 *Lev.* 275.

6. Where it was held, that the action would not lie for indicting for a rescue, though one of the judges said, that if the declaration had been laid, that the defendant knew it to be false, and it was done on purpose to draw the plaintiff into trouble, it would have lain. *Raymond* 135. *Low. ver. Bodmore*, 1 *Lev.* 169.

7. Where the matter was not sufficient to make it a conspiracy, the defendant being only a witness to find the bill. *Willings ver. Fletcher*, 1 *Bull.* 185.

P *235. *8. Where it is said the action would lie for maliciously indicting the plaintiff, being a justice of peace, for delivering a vagrant out of custody. 2 *Keb.* 416, 494. *Henley v. Burstall*, *Raymond* 180.

9. Where it was held that this action would lie for maliciously indicting the plaintiff of a trespass. *Norris v. Palmer*, 2 *Mod.* 51.

10. Where it has been held, that causing a man to be indicted for treason was not actionable. 1 *Roll.* 209. *Lovet v. Fawcner*, *Cro. Jac.* 357.

11. Where the contrary was held. *Radney v. Strobe*, and others. 2 *Show.* 469.

12. Where the defendant had prosecuted the plaintiff in a wrong court, and the action held to lie. *Bradley v. Jones*, 1 *Brown* 3.

13. An action upon the case lies for causing a man to be arrested for a cause in an inferior court, which arose out of their jurisdiction, but no action will lie against the officer, tho' the court had no jurisdiction of the cause. *Hunsdon v. Cook*, *Skinner* 301.

14. Where it was held this action would lie for a malicious prosecution in a court that had no jurisdiction, and what was said to be proper to be averred. *Smith v. Drinkwater*, 1 *Keb.* 627.

15. Where a action was said to lie for maliciously presenting the plaintiff before persons that had no jurisdiction, by reason of the expences and vexation he was put to. *Atwood v. Monger*, *Stile* 378.

16. Where the action was brought for a malicious prosecution upon an information, and held good. *Moor v. Shutter*, 2 *Show.* 295.

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17. Where the action was held to lie for informing the commissioners of the customs, that the plaintiff being an officer took bribes, whereby he lost his office. *Corbet v. Pearson*, 1 *Lev.* 154.

18. In the case of *Gray v. Dight*, reported in 2 *Show.* 144. and in *T. Jones* 132. by the name of *Gray v. Degge*; and in *Ray.* 418. by the name of *Gray v. Day*. It was held, that the action did lie against the defendant, for prosecuting the plaintiff in the spiritual court, for refusing to account as church-warden. *V. 1 Jones* 312. 1 *Co.* 63. *Cro. Car.* 291. *Cro. Jac.* 351. *Cro. Eliz.* 838.

19. And in the case of *Hocking v. Mathews*, the action was brought for maliciously impleading, and causing the plaintiff to be excommunicated in the ecclesiastical court, whereby he was taken upon an *extommunicato capiendo*, and imprisoned; and the court gave judgment for the plaintiff. For though in an action between party and party in the ecclesiastical court where (if the matter goes for the defendant) he shall have his costs, no action will lie if the court had jurisdiction; yet where there is a citation *ex officio*, and that is prosecuted maliciously without a foundation, the party will have his action; for in such suit he can have no costs according to the resolution of *Carlion and Mills*. 1 *Cro.* 291. and this shall be so intended after a verdict. This case of *Hockin v. Mathews* is reported in 1 *Ventris* 86. 1 *Sid.* 463. 1 *Lev.* 292.

20. But where the party hath a proper remedy in the spiritual court, though the suit be without cause, yet the plaintiff shall not be punished with an action upon the case. *Cro. Eliz.* 836. *Bray v. Patrid.* See *Hob.* 267. *Noy* 23, 39. 1 *Rolls Abr.* 102. *pl.* 2.

21. But if the matter be merely spiritual, yet if there arises out of it matter temporal an action will lie; as where the matter is for an excommunication which is spiritual, yet where the plaintiff charges that the defendant razed the writ, and put out the name *Harris*, and put in the plaintiff's, the action would well lie. *Cro. Eliz.* 838. *Kenton v. Wallinger.* For other cases as to this point, see *W. Jones* 304. 3 *Cro.* 285. *Kerchewal v. Smith, Darv. Abr.* 78, 79, 80.

22. Where upon a complaint to a justice, who bound the plaintiff over to appear, and the bill of indictment was found *ignoramus*, yet it was held that the action would lie. 2 *Roll* 18. *Palmer* 45.

Stiles 10. *Dogget v. Lawrey*, 2 *Cro.* 190.

*23. Where the action would lie, though no bill of indictment P *236. found. *Wright v. Black, Winch* 28, 5.

24. Where the action would lie for procuring the plaintiff to be outlawed, and what a proper county to bring the action in. *Bulwer v. Smith*, 4 *Leon.* 52.

25. Where there was a dispute, whether the action lay for the procuring an appeal for murder. *Archebold v. Borrell*, 3 *Leon.* 193.

26. Where the action was held to lie against the under-steward of an inferior court who proceeded to judgment, and execution after
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a *habeas corpus cum causa* delivered to him. *Iplett v. Williams*, 3 Leon. 99.

27. Where an action of conspiracy was held to lie for the delaying the plaintiff of his suit, and not taking bail in aailable action. *Cockful v. the mayor of Boulton*, 1 Leon. 189.

28. Where it is said an action will lie for a malicious attachment for goods, and although he said the plaintiff did not alledge the defendant knew the goods to be the plaintiff's. *Saunders v. Powell*, 1 Lev. 129.

29. That the entry of a *noli prosequi* upon an indictment was not sufficient to construe the plaintiff to be *legitimo modo acquietatus* to maintain the action. *Goddard v. Smith*, 1 Salk. 21.

30. Where the defendant had sued out a *fieri facias*, and the sheriff had returned the writ, that the goods levied remained in his hands for want of buyers, and the defendant well knowing this, sued out another, upon which the money was levied; and held that the action would well lie; for *Hob.* who delivered the judgment of the court said, if a man sued me in a proper court without ground of truth, and that certainly known to himself, I may have an action on the case against him, for the undue vexation and damage, though the suit itself be legal, and I cannot complain of it as a suit. So if a man charge me with a crime, in a court that is in no wise cognizable of the cause, I may have an action for it, and lay that very complaint to be the slander. *Vide* the case of *Buckley and Wood*, in 4 *Cooke* 14. *Water v. Freeman*, *Hob.* 205, 206, 207.

31. Where the action was held to lie for causing the defendant to be had before a justice, and there charging him with a matter that founded in felony. *Neve v. Crofts*, *Stile* 350.

Secondly, *Where and when the Action must be brought.*

1. Where the *venue* in this action shall arise from whence the cause of action arises upon an indictment of felony. *Hercote v. Handerin* and others. 2 *Bull.* 331.

2. Where it was held that this action would not lie in an inferior court for a malicious prosecution, for an indictment and acquittal in the court of king's bench. *The King v. Roberts*, *Mod. Cases in Law and Equity*, 307, 308.

3. Where the court held this action transitory. 2 *Show.* 197. *Lord Shafisbury v. Graham*, *Skinner* 43.

Thirdly, *By and against whom.*

1. Where the action was brought by husband and wife, and there was no judgment, for that *Berkley* was of opinion that the wife could

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could not join; but *Cro.* was of opinion to the contrary. *Vide W. Jones* 440. *Dalby v. Dorall & Ux.* 3 *Cro.* 553.

2. Where an action upon the case in the nature of a conspiracy was brought against three, and one only found guilty, and held good, because it is but in its nature an action upon the case, and the conspiracy only aggravation. *Pollard v. Evans*, 2 *Shorr.* 50. *S. P.* adjudged *Raymond* 176. *Skinner v. Gunter*, 1 *Vent.* 12, 19.

* Fourthly, Of the Declaration.

P * 237.

1. Where the record of the indictment was not held to be variant from that set forth in the declaration, though the first sets forth, that it was before justices of the peace only, and the latter went further, *Nec non ad diversas felonias, &c. Audiend' & Terminand' assignat'*. *Yelv.* 46. *Barnes ver. Constantine*, 2 *Cro.* 32.

2. Where the plaintiff set forth that he was indicted for felony, and had not said he was lawfully acquitted thereof, or of the said felony, but only lawfully acquitted. *Noy* 116. *Bell ver. Fox and Gamball*, *Yelv.* 161. *S. P.* 3 *Cro.* 286, 315, 419. *Marham ver. Pefcod*, 2 *Cro.* 130.

3. Where the declaration was insufficient, because the justices that sat there to acquit the plaintiff had no such power, and where malice shall be intended, and where it must be proved. *Throgmorton's case*, 1 *Cro.* 564.

4. Where the declaration was ill, in charging the defendant with conspiracy, to indict him of perjury for swearing as a witness, but show not before whom the oath was taken. *Sherrington ver. Ward*, 1 *Cro.* 724.

5. Where the declaration charging the defendant with a *simul cum* was held good, though the other not sued. *Mills ver. Mills*, 3 *Cro.* 239.

6. Where the conspiracy laid in the declaration was not well set forth to be pursued and executed, and where one partner may bring the action, and where not, without the other. *Gore and others ver. Darobney*, 2 *Leon.* 75.

7. Where the plaintiff set forth that he was indicted, and does not in this declaration say what was done thereupon, yet the action held to lie. *Arundell ver. Triggono*, *Yel.* 116.

8. Where it was held not to lie to accuse a man of treason, and where it is said, that *legitimo modo acquietatus* is necessary to an action of conspiracy, but not to an action upon the case in the nature of a conspiracy. 2 *Roll.* 259. *Palm.* 315. *Latch* 79. *W. Jones* 93. 2 *Bullst.* 271. *Smith ver. Crasshaw*, *Benl.* 152. 3 *Cro.* 15. the same case.

9. Where it was omitted in the declaration, that he *falso* imposed the crime of felony on the plaintiff, and *ex malitia*, held sufficient. *Manning & Ux ver. Fitzherbert*, 3 *Cro.* 271.

10. Where

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10. Where the declaration was held good, though the indictment was laid by way of recital, and though he did not say he was in goal, whereby to have shewn, that the justices of the gaol-delivery had power to acquit him. *Bagnall ver. Knigh*, 3 Cro. 553.

11. Whether the plaintiff may join several conspiracies in one and the same declaration. *Stroud ver. Roper*, 1 Bulst. 15.

12. Where the plaintiff alledged, that the defendant maliciously caused him to be indicted, & *quod juratores dixerunt quod ignorabant*, and it was held to be as good as if it had been said, that the jury returned *ignoramus*. *Pauling ver. Shaw*, T. Jones 20.

13. Where this action was held good, though the declaration set forth that the indictment was for felony, as accessory for suffering a prisoner to escape that was convicted of felony, though the matter charged was not felony, but a scandal lay upon the plaintiff for it; and therefore the defendant was to be punished by this action. *Gardiner ver. Jolly*, *Stile* 157.

14. The declaration sets forth, the defendant caused the plaintiff to be indicted, and that upon preferring the bill to the grand Jury, they found an *ignoramus*, and so moved in arrest of judgment that it was a repugnancy. *Roll chief justice* inclined to an opinion, that it was not material whether the indictment was good or no, and that it shall be construed according to a common intendment that he was indicted, though the indictment was not found; but *Hales* moved to amend his declaration, so they went to a new trial. *Anonymous*, *Stile* 372.

P *238. *15. Where the word *falsly* was omitted in the declaration; but *Roll* chief justice said, that as it was alledged to be *malitiose*, the word *falsly* was implied. *Kitchinman's case*, *Stile* 374.

16. Where it was held that the place ought to be shown in the declaration, where the defendant procured the plaintiff to be indicted. *Pencarwin ver. Trappin*, *Latch* 262.

17. Where a declaration in this action was held naught, for saying the defendant maliciously prosecuted him without a *just cause*, whereas it should have been without any cause, or *without any just or probable cause*. *Box ver. Taylor*, 2 Show. 154.

18. Where this action was brought against *Tracy* and others, in the nature of a conspiracy, charging them that they, *pretextu cujusdam warranti*, caused the plaintiff to be arrested and carried before one *Chamberlaine*, a justice of peace, who by the persuasion of *Tracy*, refused to bail him, though good bail was tendered, and *Chamberlaine* committed him to prison, where money was extorted from him; but in no part of the declaration was it said to be without a *probable cause*; and *Holt* chief justice held the declaration to be ill for that reason. *Muriel ver. Tracy & al*, 6 Mod. 169.

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Fifthly, *Of the Justification and other Pleadings.*

1. How far a man may encourage the prosecution of an indictment, and accompany another therein, and justify it. *Stone ver. Bates, 1 Brownlow 9.*

2. Where a justification to an action of conspiracy was held good, in as much as the defendant confessed the procurement of the indictment, and avoided the action by matter of law. *Payne ver. Rochester and Whitfield, 1 Cro. 871.*

3. Where a justification for indicting for felony was held good, and the doing of it maliciously, held not to be traversable. *Chambers ver. Taylor, 1 Cro. 900, 901.*

4. Where a justification was held ill, not shewing a sufficient cause to charge the defendant with felony. *Smith ver. Hodgskins, 3 Cro. 276.*

5. Where a justification to this action was held not good. *Wale ver. Hill, 1 Bulst. 149.*

6. Where the defendant had justified for causing the plaintiff to be indicted of felony for stealing of steers, and the defendant justified that he was possessed of five steers which were stolen from him, that he made fresh suit after them, that they were found in the possession of the plaintiff, that the defendant came to him, and demanded to have the sight of them, which he refused to do, and gave him very uncertain answers, by reason whereof he did suspect him, and so procured a warrant, and had him before Sir Thomas Bennett; who by reason of his uncertain answers upon his examination did also suspect him, and committed him, binding him over to appear at the next sessions to answer this matter; and did also then bind this defendant to prosecute against him, at which time he did accordingly prosecute an indictment against him, and then gave this matter in evidence to the jury against him, who did acquit him, and so justifies his proceedings. *Weal ver. Wells, 3 Bulst. 284.*

7. The plaintiff replied, and shews he was a butcher, and bought these steers in *Market-Overt*, and had tolled for them, and that he had killed three of them, and takes a *traverse*, *absque hoc*, that he refused to shew them to him; upon a demurrer the court was inclined to be of opinion it was a good *traverse*, and the case was retained, but the parties agreed.

*Sixthly, *Of the Judgment, Writ of Enquiry, Damages, and Execution.* P *239.

1. Where an action for words, and procuring him to be indicted, and ten shillings damages, was held to be out of the statute of 21 Jac. ca. 16. of limitations. *Bilford ver. Barnes, S. P. 307.* Adjudged *Topsal ver. Edwards, 3 Cro. 163.*

2. Where

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2. Where a judgment in an action for words, and a malicious indictment, was reversed as to the words, and stood good as to the other. *Jacob ver. Mills*, 1 Roll 24.

3. Where it is said, a man may have an action upon the case in the nature of a conspiracy, though he be not acquitted; but a writ of conspiracy he can't, unless he be indicted and acquitted; and where the bill was on an action upon the case, and the declaration, and the whole record in the nature of a conspiracy, yet the plaintiff had judgment as in case, though they require different judgments. *Cranbank's case*, 2 Roll 49.

4. It is said the jury might, in an inferior court, inquire in aggravation of damages of matters out of their jurisdiction. *Corbets ver. Pearson*, 1 Lev. 154.

5. An action was brought for maliciously indicting the plaintiff for high treason, and judgment for the plaintiff, and the jury found several damages, as to one of the defendants 50l. and as to the other defendants 1000l. the counsel for the defendant would have it, the jury could not thus sever the damages, because it was laid to be a joint trespass; and Sir *John Holt* insisted, that there is no case where a *non pros* can be entered where the pleas are joint, and therefore that would not help it, but that it was a discharge as to both upon the reason of the case, in *Hob. 70. Parker ver. Sir John Lawrence* and others; where it was held, that a *non pros* as to one, releases as to all before judgment; so in *Sir John Haydon's case*, 11 Rep. 5. where it is said, the jury cannot sever the damages in such case. *Radney ver. Strode, & al* 2 Show. 469.

6. Upon an acquittal on an indictment for a riot, and an action brought upon that acquittal, the plaintiff must prove the prosecution to be malicious. *Carthew* 416.

Concerning Actions for Slander.

In treating of this Action for Slander I shall consider,

First, The Words.

Secondly, The Manner of Declaring.

Thirdly, The Plea.

Fourthly, The Trial and Damages.

Fifthly, The Judgment and Execution.

First,

on Actions on the Case.

First, Of the Words.

In Words of Slander, these Things are requisite.

First, That the Words are either Express and Affirmative, or at least that they so far strongly imply an Affirmation, that the Hearers may intend that the Person is actually charged to have done the Fact, or subject to the Slander.

1. Where one says of another, *bear witness, mistress, he hath stolen my hair cloth*, no action lies; for this is not a direct affirmative to charge him with the stealing thereof, but altogether depends upon the testimony of another. *Yelv. 126. Bury ver. Wright.*

2. Where the plaintiff declares, that whereas he had been indicted and arraigned for robbing the defendant, and was acquitted, and the defendant said of him; *If A. and B. had done justice, he had been hanged for robbing me*, held the action lies; for it is quasi an affirmative. *Cro. Eliz. 786. Royal ver. Peckham.* P * 240.

3. If one says to another, *I know myself, and I know you, I never buggered a mare*, an action will lie; or otherwise by such sly ways of expression any man might be slandered. *1 Vent. 276. Anonymous.*

4. So if one says, *I heard a bird sing, or I dreamt J. S. stole a horse*, an action lies. *1 Lev. 277. 1 Vent. 60. 1 Syd. 434. 2 Lev. 150.*

5. If one man says to another, *you B. you will lie with a cow again; if you had your deserts you deserve to be hanged*; adjudged actionable. *Potwritte ver. Barrell, 1 Sid. 220.*

6. If A. says of B. *thou art a base rogue, and I will make thee an example and precedent for a perjured rogue*, an action lies for these words, for they are affirmative with an asseveration. *1 Roll. Abr. 49. Pl. 4.*

7. So if A. says of B. and C. *we will have them stand in the pillory, and have their ears for perjury and subornation of perjury*, it has been adjudged actionable. *1 Roll's Abr. fol. 49. Letter P. Pl. 11.*

8. So if one man says of another, *he says I am perjured, but he is a perjured knave as well as I, for he and T. swore one for another*, an action will lie though he charges him only by way of relation. *Orton ver. Fuller, Raymond 51.*

9. But if a man says of another, *he broke my house like a thief*, no action will lie, because it is not a direct affirmation, only an allusion. *2 Vent. 172. Anonymous.*

10. And it hath been adjudged, that not only words that are positive, and in the present-tense, are actionable, but likewise words that are in the preter-tense are likewise actionable; as for a man to say of another, *I am no traitor, I have seen you in the rebellion*; an action

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action lies for these words, though they are spoken of a time past, and though perhaps there may have been a general pardon since he was in rebellion; yet the court will not intend it; but if there was, the defendant ought to shew it in pleading. *Dalton ver. Sudde*, 1 *Lev.* 251.

11. But this is only where the action affects the mind, whereby *culpa erit in perennis*, for where they are spoken concerning a disease, that he supposes, by the words spoken, the plaintiff has laboured under, whereby he lost the familiarity of sober people, or where they concern a man's circumstances, there words of a man in the preter-tense are not actionable, because a man may have been cured of such a disease, and might become a man of good circumstances. *Noy* 151. *Cro. Car.* 199. 1 *Roll's Abr.* 67. *Pl.* 24.

12. As to say of a man, *that he hath broke twice*, these words are not actionable, because he may now be a sufficient man. *Latch* 114. *Noy* 77.

13. Yet in 1 *Jones* 321. it is there held, where a man said of another, *thou camest a broken merchant from* *Hamburgh*, after a verdict and special damages proved; so these words have been held actionable.

14. *I will prove he hath been a bankrupt, and hath agreed with his creditors for a noble in the pound*, it hath been adjudged, that these words were actionable. *Hill.* 3 *Jac. B. R. Edmunds ver. Whetstone*, *New Dy.* 72. *b.* in the margin.

15. But if a man says of another, *thou art a base fellow, and hast had the French pox*; no action will lie for these words, because he may have been cured. *Noy* 151. *Parfch.* 6 *Ja. Allen & Smith. Allen* 30.

16. And not only words spoken to, or of a man affirmatively, but words by way of *interrogation* have been adjudged actionable, and P*241. *very justly; for otherwise it would be in the power of any man to do another an injury by the most malicious words that can possibly be spoken by putting them into an *interrogating phrase*; whereas the hearers have as clear an idea of their having been spoken in defamation of him for whom they were intended, as if they had been spoken to a man, charging him expressly with the facts meant thereby.

17. As if a man says to another, *when wilt thou bring home the nine stolen sheep which thou stolest from* *J. S.* an action will lie for these words, 37 & 38 *El. Hunt ver. Thimblethorpe*, 1 *Roll's Abr.* 48. *Letter K. pl.* In like manner for these words, *have you brought home the 40l. you stole*, held actionable. *May ver. Gibbons*, *Cro. Jac.* 568.

18. What other interrogating words have been actionable, are in the following cases.

Cro. Jac. 422. *Nelson ver. Staffe.* | *Moor* 418. *pl.* 573. *Thimble-*
March 58. | *thorpe's case.*

Cro. Eliz. 273. *Jordan ver. Lister.* | *Palmer* 66. *Gibbons ver. Maggatt.*

Cro. Eliz. 26. *Griffith ver. Morrison.* | 2 *Roll's Rep.* 165. the same case.

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19. So conditional words have been held to be actionable, as if a man says, *If J. S. might have his will he would kill the king*, an action upon the case lies. *Sydenham and Man, Cro. Jac. 407. 1 Roll's Rep. 427. 3 Bulst. 260. Hob. 180. 1 Roll. 49. Letter O. pl. 1.*

20. But words in the disjunctive have been held not actionable; as if *A. says of B. to C. his brother, Sirrah, thy brother B. was whipt about Taunton castle for stealing of sheep, or else was burnt in the hand or shoulder*, whereas he in truth never committed any such felony; these words are not actionable, because a man could not have been burnt in the shoulder for stealing sheep, so it makes the words uncertain. *Cro. Car. 283.*

21. *Thou hast stolen my mare, or consenting to the stealing of her*, has been held actionable. *Cro. Eliz. 780. Griffith's case, Noy 172.*

22. Negative words have been held not to be actionable, as to say, *I never came home and poked my wife*. *Clerk ver. Dyer, Trin. 10 Geo. Mod. Cases in Law and Equity. 290.*

Secondly, *The matter charged must be such as, if true, is against some positive law, and the party may be punished for it; or else the person of whom they are spoken, must have received some special prejudice by the words which he must aver.*

1. 'Tis to be observed, that the words merely *spiritual* without any *temporal loss*; as calling a man *whore-master*, or a woman *whore*, are not actionable, *1 Roll's Abr. fol. 35. pl. Letter D. pl. 1. Matthew v. Croze.*

2. But for words of *spiritual* cognizance only with a *temporal loss*, an action will lie; as where a man said of a woman, *that J. S. had the use of her body*, by which she loses her marriage, are actionable. *1 Roll's Abr. fol. 35. L. D. pl. 5. Morrison v. Cade.*

3. And there is no difference where the words are spoken of a man or woman, if he loses his marriage; where the words were, *Thou art a whore-master, for thou hast lain with Borwn's wife, and hadst to do with her against a chest*. *1 Roll's Abr. fol. 35. pl. 5. Lai. 218. 2 Roll's Rep. 273. Palm. 85. Cro. Ja. 323. 2 Bulst. 89, 90. 3 Bulst. 48.*

4. So where the defendant said, that the plaintiff *had the use of his wife's body by force*, and by reason thereof, the plaintiff was carried before justices, and examined for a *rape*, and laid out several sums of money to get clear from that imputation; these words are **actionable* in regard of the *temporal loss*. *1 Roll's Abr. 35. L. D. pl. P *242.*

9. *Harris v. Smith, Litt. 337.*

5. But where the words are spoken in *London*, of a woman calling her *whore*, they are actionable without alledging any *temporal loss*; because by the custom of that place, she is liable to a *temporal loss*, that is, to be carted. *1 Roll's Abr. 36. L. D. pl. 13. Hassell v. Capcot*; 'tis said in *1 Syd. 97.* in the case of *Roberts v. Herbert*, that there is the same custom in *Southwark*.

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6. To pronounce a man *excommunicated*, without having any proper authority for so doing, is actionable. 1 *Roll's Abr.* 37. *Barnabas v. Trauntor*, pl. 15. but to say a man is *excommunicated* is not actionable. *Skinner* 124.

7. If one calls a woman *copyholder*, while she is sole, a *whore*, 'tis actionable, by reason of the special damage which may accrue to her. 1 *Syd.* 214. *Boys v. Boys*, 4 Co. 17.

8. So to say of another that has lands by descent, that *he is a bastard*, an action lies, because these words tend to his disinherittance, and disturbance by suit. 1 *Roll's Abr.* 37. pl. 16. Co. *Entr.* 28. pl. 25.

9. But if a man *be son and heir apparent only*, and such words are said of him, no action lies. 1 *Roll's Abr.* fol. 37. pl. 18.

10. Yet where the plaintiff declared, that he was heir apparent to his father, and B. his brother, and that they had lands, &c. and intended to have suffered these lands to have descended to him, and by reason of speaking these words intended to disinherit him, it was held the action did lie. 1 *Roll's Abr.* fol. 38. pl. 21. *Humfrys v. Slutfield*, Cro. Car. 436. Godb. 327. 2 *Roll's Rep.* 249, 250. 1 *Roll's Rep.* 244. 3 *Bulst.* 75. Cro. Eliz. 346. Dal. 63. Godb. 328.

11. Words subjecting a man to punishment may not be actionable unless scandalous; as where before the late statute of the 5th of king G. cap. 15. sect.—for killing deer, the words were, *Thou art one of those that stole my Lord Shafisbury's deer*, was held not actionable; for though imprisonment, which was then the punishment will follow, yet 'tis said by Holt not to be a scandalous punishment. Salk. 696. *Turner v. Ogden*.

12. The calling a woman an *hermaphrodite* was adjudged actionable, with special damages averred, setting forth she was a schoolmistress, and lost a great many scholars. 2 *Show.* 18. case 11. *Whetherhead v. Brook*.

13. But where words are not actionable in themselves, and the special damage averred to have been received, could not by any construction be received, there though the special damage is averred, yet the words are not actionable with such an averment; as where a man spoke these words of a butcher, on a colloquium of a cow, and the flesh, *that the cow died with calving*; per quod he lost customers, after a verdict the judgment was arrested; otherwise would it have been if the plaintiff had averred that he could not sell the rest of his cow. Salk. 693. *Tassan v. Rogers*.

Of Words charging a Person with a Disease.

1. In charging a man or woman with having the *French pox*, it is necessary that the words carry a plain indication, that the defendant meant the *French pox*, otherwise no action lies for speaking them;

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them ; as for example, no action lies for the several words following, to say *Thou art a pockey whore, go to John Hawkins the leach for the pox.* Mich. 17 Jac. B. R. between and Farin, 1 Roll's Abr. 67. L. T. pl. 23. and it was so held in Cro. Jac. 499. in the case of Hunt and Jones.

2. So the words *Thou art a thieving whore, a pockey whore, and I will prove you a pockey whore*, were adjudged not actionable in the case of Culliford and Knight, in Cro. Jac. 514. because it is said there, that the last words cannot make an indictment of the French Pox ; yet Q. if this last case be law ; for in 1 Syd. 373. it was held, P *243. that to call a man thieving rogue was actionable, because it implies an act done ; if so, why would not these words be actionable ?

3. And observe in 1 Siderfin 50. in the case of Marshal and Chickhall, these words were adjudged actionable, *your daughter is a whore, and a pocky ars'd whore*, because the words, you have had the pox, are coupled with the word whore, it is a plain indication that the defendant meant the French pox.

4. To say *a man has got the pox, and that he got it by a yellow hair'd wench in Moor-fields*, tho' the latter words do not carry a violent intendment, that the speaker meant the French Pox, yet because the sense leads more that way than any other, there the words have been adjudged actionable. 6 Mod. 24. 1 Lew. 280. 1 Sid. 432. 1 Vent. 50. 1 Cro. 509, 510.

5. The words, *thou art infected of the pox, and thy wife was laid of them*, an action upon the case lies, Cro. Eliz. 28. for it plainly appears that he meant the French Pox ; and great stress was laid upon words that amount to the meaning of being laid of the pox, or eaten with the pox. Cro. Eliz. 878. Cro. Eliz. 214. 2 Brownlow 276.

6. So to say *Thou art a rogue, and a pocky rogue, and the pox haunts you twice a year*, these words have been adjudged actionable words. 1 Roll Abr.

Of words that are actionable, if spoken of a man to scandalize him in his office.

1. If one says of a justice of peace, *he hideth and covereth felonies*, 4 Ca. 19. or that *he is a smotherer and maintainer of felonies.* Cro. Jac. 268.

2. So that *he is a basket justice, a partial justice, I will give him 5l. every year for his gifts for justice matters*, an action will lie for these words. Partial justice touch him in his office, and charge him with corruption therein. Mich. 4 Jac. Kemp & Housegoe, Cro. Jac. 90.

3. So of a town clerk of D. and steward of the court, that the defendant said of him, *he had taken 40s. treble*, is actionable, for it must

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must necessarily be intended to be spoken of him in the due execution of his office. *Mich. 6. Ja. Nole and Swanser, Yelv. 1, 2. Godb. 157.*

4. So if one says of a justice of peace, that *he is an half-ear'd justice, and can hear of but one side.* *Trin. 7. Car. Sir William Marsham and Bridges, Cro. Car. 223.*

5. So of a lord chief baron, that *he can hear but of one ear, if spoken on a discourse at his administration of justice.* *Heth. 161.*

6. But if one says of a justice, he is not worth a groat, and is gone to the dogs, no action lies for these words, notwithstanding the statute of *H. 6.* requires, that a justice of peace should have 40*l. per ann. 1 Ventris 258.*

7. It has been held, that if *A.* says to *B.* *you would be a justice of peace like Major F. a fool, an ass, a coxcomb, a buffle-headed justice,* *F.* can have no action; and adjudged by three judges against one, that to say of a justice of peace, *he is a fool, ass, and a beetle-headed justice,* are words not actionable. *1 Lev. 52. 1 Darw. 121. and in the 4th Reg. 13.* to call him rogue or varlet was not actionable; but in the case of *Ashton and Blagrave, Trin. 10 G. 1.* to call a justice of peace a rascal, villain, and a liar, with a *Colloquium* of his being a justice of peace, were held to be words actionable.

8. Words for which an action may be brought that relate to a man's office, by charging him with a crime in the execution of it, must carry in themselves a plain and direct meaning to charge him with a crime that is punishable, of their being spoken of his office, or otherwise no action will lie; as in the following words spoken P * 244. of a chancellor of the consistory court; *There goes your rare chancellor, innuendo the plaintiff, to suborn witnesses to swear against a person;* these words were held not to be actionable. First *to suborn persons to swear is not a crime punishable;* so barely to say that another suborned a person to forswear himself, without any thing more, is not actionable, without there was such a communication that plainly demonstrates that forswearing to be in a cause, or before a magistrate in some matter, that his forswearing himself was perjury; and to name him chancellor, is only *designatio Personæ*, and does not of itself make it sufficiently evident, that such words were spoken of him in execution of his office. *Walmsley and Russell, Trin. 3 Annæ B. R. 6 Mod. 200, 201, 202, 203, 204.*

9. In offices of profit, words that impute either defect of understanding, ability or integrity, are actionable; as to say of a justice of peace, that *he is an ass, and a beetle-headed justice* is not actionable, because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonesty or corruption, as in case where the office is an office of credit, and the party charged with inclinations and principles which shew him unfit, and that he ought to be removed, which is a disgrace. *Salk. 695.*

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Of scandalous words spoken of a man tending to injure him in his trade or profession.

1. Scandalous words that tend to injure a man in his trade or profession, are (as I conceive) of all others as injurious, or rather more so, than those which tend to deprive him of his life or liberty, or that subject him to a fine or corporal punishment, or to deprive him of the communication and familiarity of mankind; because, as to words which tend to deprive him of life or liberty, or which charge him with a crime which would subject him to corporal or pecuniary punishment, he must first be convicted by form of law before he can lose his life, or receive such punishment.

2. And in the case of words spoken of a man which tend to deprive him of the familiarity and conversation of mankind, they cannot be so injurious; and because, if a man is a skilful workman, or an honest dealer, a fair practitioner, or an ingenious man in his profession, he will be solicited by some part of mankind, that perhaps at another time would not have a familiarity or conversation with him.

3. But words spoken of a man as to his trade or business, which tend to deprive him of the means of getting his livelihood, may render life, liberty, and the conversation of mankind of little service, when he cannot get his bread; and besides not only himself, but perhaps a wife, and ten children may be injured by the wounds a man receives in his reputation as to his trade or employment; and therefore stronger intendments ought to be made in such words, than in any of the former, but not such intendments as the hearers would not have made themselves.

4 Yet it is to be known that such words are to be precisely spoken of a man's trade—as to say of a common carrier, that *he is a common Barretor*, no action lies. *Hob. 140.*

5. So it is said, that if *A.* keeps a stable in *London*, and uses to receive horses or livery, and *J. S.* says *thou buyest nothing but stinking rotten hay to poison mens horses*; that no action lies, because he is no inn-keeper, and so it is not any trade in law; *Pasch. 14 Car. B. Jones and Joyce*; 1 *Roll's Abr. F. 60. pl. 7.* but *Q.* whether that be law; for a keeper of a livery stable is a trade mentioned in the charter of *H. 8.* and confirmed by King *Charles 2.* which incorporated the innholders of the city of *London*, and well known now to be a trade distinct from that of an innholder.

*6. To say a man *is a knave, he has cozened me in false measure of my barley*, these words are not actionable, unless you shew that the plaintiff lived by selling barley. *Mich. 13 Jac. C. B. Bray and Hays*, 1 *Roll. Abr. F. 62. pl. 23.* 1 *Brownl. 4. Hob. 76.* P *245.

7. So if a man says of a smith, that *he cozened him of a noble in a pair*

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pair of wheels, these words are not actionable, because he might cozen him only in the price. *Pasch. 16, Jac. Digner and Snelling, 1 Roll's Abr. F. 62 pl. 24.*

8. Words of a shoemaker, *that it is no matter who hath him, for I warrant whoever hath him he'll cut him out of doors*, with an averment, that where they were spoken, it amounted to as much as to say, *he would ruin his master*, were held actionable. *Ellis and Hunt, March 1 Pas. 15 Car. 2. B. R. 1 Roll's Abr. F. 60. pl. 7.*

9. If one says of a merchant, that he is a bankrupt, an action lies. *Mich. 7. Ja. Long and Long, 1 Roll's Abr. F. 61. pl. 18.*

10 And it hath been said, that it is otherwise if no merchant.

11. But I apprehend, and so it appears in the books, that if the words are spoken of any person that is within the description of persons, that by the acts of parliament may be a bankrupt, they are actionable, as may be seen in the case of *Cook and Tucker, Carthew 330.* where the case of *Garrett and Shelfon* is cited, where these words were spoken of a weaver, *he is a pitiful idle rascal, and not worth a groat*; for when a man gets his living by a trade, that consists of buying and selling, and which is to be supported by the opinion that mankind have of his credit and circumstances; words spoken in diminution of the credit of such person, are equally as injurious, as if they had been spoken of a merchant. *1 Roll's Abr. F. 60. pl. 11.*

12. If one says of a merchant, or of such a person, *I believe all is not well with him, there are many merchants have lately failed, and I expect no otherwise of him* an action lies for such words. *Mich. 22 Car. 2. the case of Vivian and Willet, Raymond 207.*

13. If one says of a merchant, *you are a cheating fellow, and keep a false book, and I will prove it*, no action lies without an averment that there was a colloquium of his trade. *Todd and Hastings, 2 Saund. 307.*

14. So to say, *he hath deceived me in a reckoning, and his debt-book which he keeps in his shop is a false debt-book, and I will make him ashamed of his calling*, are held to be words not actionable in the case. *Brooks and Clarke, Mich. 21 Jac. 1 Roll's Abr. F. 62. pl. 22.*

15. So to say, *he is a false man, and I will prove it, and he keeps a false debt-book, for he charged me with a piece of three piled velvet which I never had*, were held actionable. *Brook's case, Moor 409. Hutton 14. Cro. Eliz. 403. Palmer 65.*

16. So these following words were held to be actionable, *he is a cheating knave, and keeps a false debt-book with which he cheats the country.* *1 Vent. 263*, but note there was a colloquium of his trade.

17. These words spoken of a fuller were likewise adjudged to be actionable, *trust him not, for he owes me 10l. and is not worth a groat.* *Hutton 124.* So *he is not worth a groat, he is 100l. worse than naught*

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naught, were adjudged actionable words, spoken of a merchant. *Gr. Car.* 265.

18. So these words, spoken of a woman that carried on the business of a woollen draper were adjudged actionable, *she keeps a false shop-book, and the country complains against her for making her debts twice over, or two times over.* 1 *Ventris* 117. *vide* *Hern's Pleader* 212. *Rob. Ent.* 46.

19. If a man was a merchant, that had left off his trade; yet the calling him a bankrupt was adjudged actionable, for he might exercise his trade again. *Mich* 7. *Jac. Long and Long, Pasch.* 44. *Eliz. B. R. Trin.* 39. *Eliz. B. R. Gardner and Hopwood.* 1 *Roll's Abr.* 66. *pl.* 16, 19.

20. If a man says of a tradesman, *thou art a beggarly fellow, and had it not been for my help, he had not had a bit of bread to put in his mouth, and I have exactly cast up his estate, he is not able to pay above* P* 246. 2s. and 6d. in the pound to his creditors of their debts; for this discredits him in his trade, and an action lies without averring any particular damage. *Stile* 273. *Smith and Rooker, Intratur Pasch.* 1651. *Roll* 311. 1 *Roll's Abr. F.* 60. *pl.* 12.

21. In an action upon the case, if the plaintiff declares that he was for several years past a brewer, and got his living by brewing and selling of beer to his customers, and that he brewed wholesome beer, and that the defendant having a discourse with his customers about his trade, and of his beer brewed by him, to the intent to discredit him and his beer, as well to his customers as neighbours, with whom he had before traded, said these words of the plaintiff, and his beer; *I will give my mare a peck of malt, and lead her to the water, and let her drink, and she shall piss as good beer as any Tom.* Fenn, (who was a plaintiff) brews. By speaking of which words, he was esteemed among his customers and neighbours to brew and sell unwholesome beer, and they after refused to buy beer of him, and to have any dealing with him in his said trade. No action lies for these words, without shewing some particular damage thereby, as that some particular persons abstained from buying beer of him, or such like particular loss; for these words shall be taken to have been spoken in merriment and jest; for it is impossible to be true in the understanding of any man, and it may be intended he brewed small beer, and not unwholesome beer. *Mich.* 15. *Car. B. R. between Fenn and Dixie*, adjudged *per totam curiam*, in arrest of judgment, after a verdict for the plaintiff. *Intratur Trin.* 15. *Car. Rot.* 838. 1 *Roll's Abr. F.* 59. *pl.* 1.

22. In an action upon the case for words; if the plaintiff declares that he had used the trade of a brewer for several years, and had brewed wholesome beer, and sold to his customers, by which he had got great profit to himself; and that the defendant, to the intent to discredit him to his customers, *super colloquium de & concernent* the said occupation and art of the plaintiff, maliciously spoke these

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these false words of him, *Lee's Beer is unwholesome*, (innuendo *the beer of the plaintiff made for his customers in his trade*,) by which he is discredited, and has received damage in the sale of his beer in his trade, as he ought, before any action lies for these words; and upon this declaration, tho' he does not charge him with any deceit; for beer may be unwholesome for want of good brewing, or for other neglect of his servants. And though it does not appear, that the defendant spoke these words of beer that he sold to his customers; yet upon this declaration, (tho' the innuendo will not help it) it shall be intended such beer as he sold to his customers having a discourse of his trade, and brewers are punishable for selling unwholesome beer by the statute; and it is alledged, that by the speaking of these words he had damage, and therefore this action lies. *Mich. 9 Car. B. R. between Lee and Stradwich adjudged; it being moved in arrest of judgment by myself. Intratur Trin. 9 Car. Rot. 1097, 1 Roll's Abr. F. 62. pl. 2.*

What other words spoken of a tradesman are actionable, and what not. See hereafter.

23. Words in disgrace of a man's profession must appear to be spoken precisely of his profession; as to say, *You may be ashamed to employ that knave, for you will receive disgrace and shame by it; for he is a knave and a proclaimed knave in open market*, by which he lost several of his clients; these words are actionable. *1. Roll's Abr. F. 52. L. S. pl. 1.*

24. So to say, *Is H. your attorney, take heed and follow him well, or else he will make you throw your purse over your bosom*, was actionable. *Winch 41. Cro. Car. 459.*

25. *He is a base rogue, and maintains his wife and children by his knavery and cheating tricks*; these words were held to be actionable. *Shawe v. Wakeman, 14 Car. B. R. 1 Roll's Abr. F. 53. L. S. pl. 2.*

P * 247. * 26. *He is the falsest knave in England, and will cut my throat*, were adjudged actionable words, spoken of an attorney. *Dal. 63. Kel. 140.*

27. If a man says of an attorney, *Thou sayst thou art an attorney, but I think thou art but an attorney's Clerk, and if thou be, I will have thee pitched over the bar next term*; were adjudged to be no actionable words, because it is uncertain, whether he himself would pitch him over court. *7 Jac. Trotman's case, 1 Roll's Abr. 55. pl. 18.*

28. A man says of an attorney, *that he is a common maintainer of suits*, no action lies for these words, because it is no discredit, for 'tis his profession to maintain suits. *Hill. 4 J. B. Boxe and Barnaby, 1 Roll's Abr. 53. pl. 6.*

29. But to say, *Thou art a common maintainer of suits, and a champertor, and I will have thee thrown over the bar next term*, is actionable. *Hob. 163. 1 Roll's Abr. 53. pl. 6.*

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30. So to say, *He is a common stirrer up of suits, and a disturber of the peace, and so a mover of unjust actions*, was adjudged actionable. *Hes. 140.* by eight judges.

31. So to say, *He sets people together by the ears, and we shall have him indicted for a common barretor*, was adjudged actionable. *Carter 214.*

32. So if one says of a surgeon, *he poisoned the wound of J. S. for gain*, an action will lie; for the words scandalize him in his profession. *Mich. 33 & 34 Eliz. 2 And. 268.*

33. So if one says of a midwife, *many have perished for her want of skill*, an action lies. *Pas. 7 Car. Flower's case. Cro. Car. 211.*

34. But where words don't immediately tend to a man or woman's profession, yet if in their profession they receive damage thereby, an action lies; as to say of a school mistress *she is a whore*, and *J. S. keeps her as his whore*, these words are actionable, with special damages shewn. *1 Ventris 21.*

What other words spoken of an attorney are actionable. See hereafter.

Of words in disgrace of a man's dignity, for which an action of Scandalum Magnatum lies.

An action of *Scandalum Magnatum* was first appointed, and took its being as to the shape we now find it in, from *2 Rich. 2. cap. 5.* where it is said, "*Item, of devisers of false news and horrible lies of prelates, dukes, earls and other nobles, and great men, and of the chancellor, treasurer, clerk of the privy seal, steward of the King's house, justices of the one bench, or the other, and other great officers of the realm, &c. It is enacted, none shall devise, speak, or tell any false news, or other false things, of prelates, lords, and others aforesaid, whereof discord or slander might arise within the realm; and he that doth the same shall incur, and have the pain thentofore ordained by the statute of Westminster 1.*" which wills, that he be taken and imprisoned, till he have found him of whom the word was first moved.

By the several cases in the books hereafter mentioned these following points have been adjudged.

1. That this statute extends to viscounts, tho' there were none at the time of making the act. *Cro. Car. 13. viscount Say and Seal v. Stephens, Palmer 361.*

2. That it extends to bishops, see the bishop of Winchester's case in the 2d. of *H. 8.* cited in *1 Leon. 336.* *1 Cro. 1.* Bishop of *Norwich v. Prickett*, bishop of *Chester v. Jones*, *3 Koble 315.*

3. But these words were held to be not actionable of the archbishop of *York*, *That he was a covetous and malicious bishop.* *Moor 38.*

4. That

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4. That it lies for general words of slander, though nothing certain is charged; as where one said of a peer, *he is an unworthy person, and acts against law and reason.* 2 Mod. 150, 151. Lord P * 248. *Townsend v. Hughes*, see judge *Atkins's* argument, for the words not being within the statute. 2 Mod. 161.

5. And what might be a good exception against words to make them not actionable in the case of a common person, will not hold in an offence of so high a nature, as this is, from the dignity of the person of whom they are spoken; as where the words were, *I met J. S. whom I do not know, but my Lord Peterborough sent after me to take my purse* 1 Lev. 277. *Lord Peterborough v. Sir John Mordant.* 2 Cro. 196. 1 Ventris 59, 60.

6. But see *Gouldsb.* 115. in the case of the Earl of Lincoln against *Michelborne*, where the words were, *the Earl of L——'s men, by his command, took the goods of one H. by a forged warrant*, there it was held an action of *scandalum magnatum* would not lie, because it was not said the Earl knew the warrant to be forged.

7. Where the *venue* was not to be changed upon the common affidavit. *Carthew* 400. *Duke of Norfolk v. Alderton*, 2 Show. 96. *Gerrard v. Loyd*, 1 Syd. 185.

8. Yet in the case of the Earl of *Shafisbury v. Cradock*, and the same against *Graham, Skinner* 40, 44. it was granted, that the *venue* should be changed where the reason of it was potency, and the plaintiff was conceived to have a very great interest in the place where he had laid his action. *T. Jones* 192, 198. In a motion to change the *venue* in the case of the marquiss of *Dorchester*, in 2 Mod. 216. *North* chief justice said, he always took it as a current opinion, that in a *scandalum magnatum*, the *venue* could not be changed; but *Atkins* was of the contrary opinion.

9. Where it was said no costs are to be given the plaintiff. 2 Show. 506.

10. Where the court denied the holding the defendant to special bail. 3 Mod. 4. the Earl of *Maclesfield's* case.

11. Where it was adjudged this statute was not misrecited, though the plaintiff had not exactly taken in all the words of the statute in his declaration; inasmuch as there was enough recited to maintain the action. *Earl of Shafisbury v. Lord Digby*, 2 Mod. 98. 3 Keb. 631, 641, 647, 661. *T. Jones* 48.

12. Where the plaintiff had set forth, that the defendant spoke lies of the plaintiff, viz. *hæc Anglicana verba sequentia*, and does not alledge he spoke the words; but it was adjudged that the *mendacia*, which were alledged to have been told, were the *English* words which were spoken, and the viz. *hæc Anglicana verba sequentia*, being in the accusative case, are governed by the same verb, which governs the precedent words, viz. *horribilia mendacia*; besides, for the supporting of an action, the viz. may be transposed, and then it will be well enough, viz. the defendant spoke *hæc Anglicana*

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glicana verba, viz. lies of the plaintiff. Earl of *Shafisbury* v. Lord *Digby*, 2 *Mod.* 98.

13. Where the declaration was held good, though it did not conclude *contra formam statuti*. Lord *Leicester* v. *Mandy*, 2 *Sid.* 21, 22, 30, 31.

Thirdly, *There must be a sufficient Certainty in the Thing charged, and not by Inference or Argument; or if with a Crime, he must not be charged with a bare Intent.*

1. Where one man said of another, *thou shouldst have set in the pillory if thou hadst thy deserts*, no action will lie, because the words are too general, and no certainty of the charge. *Moor* 243. pl. 383.

2. So where one man says to another, *thou deservedst to be hanged*, no action lies for these words; for this only expresses his opinion of him. *Hake* v. *Melton*, *Yelv.* 90.

3. So where the words were, *thou art a scurvy bad fellow, and hast done that thou deservedst to be hanged*, held not actionable. 1 *Roll's Abr.* fol. 43. Letter G. pl. 5.

*4. Where the words were, *thou hast stolen my mare, on consented* P*249. *to the stealing her*, was held not actionable; for there is no certainty in the thing charged. *Cro. Eliz.* 780.

5. Where one man said of another, *he struck his cook or the head with a cleaver, and cleaved his head, and one part lay upon one shoulder, and another part on the other*; no action lies, for it is not directly alleged that he killed the cook, only by inference and argument. *Cro. Jac.* 184. *Holt* v. *Astrigg*.

But Words that may affect Life, Limb, Member or Liberty, are all actionable, without any particular Damage averred.

1. If one man says of another, *thou art a perjured fellow, for thou hast forsworn before the lord bishop of Norwich*, no action lies for these words, because he does not say this was in the bishop's court, and so uncertain whether it was perjury, and it shall not be intended to be in his court. *Keeble* v. *Page*, 1 *Roll's Abr.* fol. 69. pl. 41. Vide *Cro. Ja.* 436. where there is the same case, and the words there said to go further, *thou wert forsworn in the bishop of Gloucester's court*; but otherwise adjudged in the case of *Lee* v. *Secombe*, where the words were *he was falsely forsworn in the court of the bishop of Exon, at Exon*, and the plaintiff had judgment.

2. The like point was adjudged in *Hob.* 283. in the case of *Adams* and *Flemming*.

3. In the case of *Skinner* v. *Trebe*, where the words were, *thou wast forsworn in Collet court*; it was adjudged for the defendant, because

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cause it does not appear, that there was any cause depending there, nor that *Collet court* was a court of record; and without some other description, the court cannot take notice that it is a court of record. *Cro. Jac.* 190. *Moor* 404. *Cro. Jac.* 204. *Cro. Eliz.* 178. *Cro. Car.* 135.

4. Where one man says of another, *thou art a forsworn fellow, and I will prove thee one, for thou settest thy hand to a bond of mine, and swore nay*; it was held no action lay for the incertainty. 1 *Roll's Abr.* fol. 70. pl. 43.

5. Where one says of another, *thou art a forsworn man, I will teach thee the price of an oath, and I will set thee in the pillory*; an action lies for these words, because it shall be intended such a forswearing, for which he should stand in the pillory, and not a voluntary oath. 1 *Roll's Abr.* fol. 70. pl. 46. *Hetley* 63. *Cro. Jac.* 613. *Cro. Eliz.* 572. *Godb.* 340.

6. Observe therefore the difference between calling a man *perjured*, and calling a man *forsworn*, for every forswearing is not perjury.

7. If one man says to another, *thou art forsworn, and didst take a false oath at the assizes at Hereford against J. S.* Here 'tis necessary there should be an averment, that this was at a trial, or before the court or jury, for it might be at a private house, or other place, and yet at the assizes, *Pritchard against Smith.* 1 *Roll's Abr.* 42. pl. 28. 1 *Ventris* 195.

8. But where the words were, *that he was falsely forsworn before the justices of assize, between A. and B.* they were held actionable. *Hetley* 119.

9. Where one says of another, *thou hast made forged writings, and thou shouldst have lost thy ears for it*; it is said no action lies for these words, because it is altogether uncertain what writings he intends by the first words; for perhaps he may intend some writings, the forging of which will not deserve the loss of his ears; and then the last words do not explain his intention in as much as it may be, that this was but a bad conclusion of the premisses, 1 *Roll's Abr.* 65. pl. 8. *Winch* 39, 40, 90. 3 *Leon.* 231. 1 *Leon.* 101. *Cro. Eliz.* 853. 3 *Leon.* 231. *Cro. Eliz.* 296. 3 *Eulst.* 265. 1 *Roll's Rep.* 431.

P *250. 10. Where a man said to J. S. *thou hast caused a deed to be forged, and a dead man's hand to be put to it, and cheated and cozened my husband of his land*; an action lies for these words, though they express not what manner of deed it was, whether it was such a deed as was within the statute of forgery; for forgery is an offence at common law, for which the party may be indicted, though not within the statute. *Pudsy v. Pudsy*, 1 *Roll's Abr.* 66. pl. 10.

11. Words of *theft* are actionable, though they don't charge the party with a crime, that amounts to any more than petty larceny. 1 *Roll's Abr.* 40. *L. H.* pl. 1.

12. And it may not be improper here to take notice, that this action does not lie only for words that charge a man with having committed

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mitted a particular fact; as by saying, *thou hast stolen my horse or the horse of John Stiles*, but likewise for words that charge a man with being guilty in general of crimes of that nature; as to say of another *he is a thief*, an action upon the case was held to lie, *Minors v Liford*, 1 *Roll's Abr.* fol. 42. pl. 1. but this case is reported in *Cro. Jac.* 114. by the name of *Minors v Leeford*; and there the words are said to be, *thou art a thief, and hast stolen my master Sir George's tree*; but the same point was adjudged in *Cro. Eliz.* 857. *Robins v. Frank*, and in 2 *Bulst.* 134. *Ow.* 47.

13. So to say, *I charge you with felony*, an action lies. *Noy* 124. *Baſſy v. Child.* 1 *Roll's Abr.* fol. 43. pl. 3. 1 *Jones* 302. *Cro. Car.* 276, 277. *Latch* 175. *Cro. Car.* 277.

14. So where there was a discourse concerning the wife of J. S. and then one said, *who will say this of me but J. S.'s wife, who is a whore and a thief*, was adjudged actionable. *Griffith v. Johns*, 1 *Roll's Abr.* fol. 42. pl. 2.

15. And an action was brought for these words, *George Button is the man who killed my husband*; and though in *Cro.* 306. words of the like nature were thentofore not held to be actionable; yet the court was of opinion that these words were actionable. and several cases were cited to prove these words were not actionable; but the court said, *distinguenda sunt tempora*; for in those days people were litigious, and therefore the judges discouraged actions for slanderous words; but now too much liberty is taken to abuse people with their tongues, and therefore they should be restrained by justice, so that now any words that are spoken maliciously shall be taken to be *in malam partem*, &c. *Modern Cases in Law and Equity* 24. *Button v. Heyward and his wife*, *Cro. Eliz.* 49, 270, 883. 4 *Rep.* 15. 2 *Cro.* 166. *Cro. Car.* 489. 2 *Lev.* 150. *Salk.* 695. 1 *Ventr.* 117. *T. Jones* 144. 1 *Sid.* 52.

16. So not only words which charge a man with being a thief, a highwayman, or a murderer in express words, are actionable, but likewise when a scandalous epithet is put to defame a man, it renders words actionable; as to call a man *coney-catching cheating thief*, have been adjudged actionable. *Bodhead and Smith*, *Trin.* 9 *Car.* *Roll.* 12, 48. 1 *Roll's Abr.* 47. *Letter I*, pl. 7.

17. And it is proper to take notice, that there is great difference between words where the epithet or adjective word is that, which, had it been a substantive, would have been actionable, but is joined to a word that is not actionable; and an epithet or adjective, which would have not been actionable, had it been a substantive, yet being joined with a word, which, had it stood alone, would have been actionable, renders the whole words likewise so; as for example, in the last instance, to say to another, *thou art a coney catching cheating thief*, is adjudged actionable. Why? because to call a man thief is actionable, and the other words, though they are not actionable in themselves, nor would have been so, had they been substantives;

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P *251.

tives ; yet they do not mitigate or explain away the strong power of the words importing that the person spoken of is a thief. But now *in the first instance, to say to a man, *thou art a coney-catching cozening rogue, cutpurse rogue*, yet these words are not actionable, because all but rogue are adjectives. *Betts and Trevanion, Cro. Jac. 536.* reported in *Palmer* by the name of *Trevilian* and *Bettie's* case, and in 2 *Roll* 91. reported by the name of *Brett* and *Trevilian's* case. But if a man calls another *buggering rogue*, and says, *I could hang you*, these words are actionable, because a man cannot be a buggering rogue without having committed sodomy. 1 *Sid.* 373. So to call a man a *perjured knave*, an action will lie, because the import of the words communicate and leave a strong idea with the hearer, that he had committed perjury, 4 *Co.* 19. *Stile* 6.

18. *Thou art a thievish knave* ; these words are not actionable, because they only import a corrupt inclination to theft, 4 *Co.* 19. but to call a man *thieving rogue* is actionable, because they import, that a man has committed an act of theft. 1 *Sid.* 373.

19. If a man says to another, *thou wouldst have killed me*, no action lies, because he charges him with a bare intention only. 1 *Roll's Abr.* fol. 51. pl. 8.

20. So, *thou wouldst have robbed me*, was held not actionable, because no act was shewn to be done in order thereto. *Cro. Eliz.* 250. *Cro. Eliz.* 710.

21. But it was adjudged in *Lane* 98. in the case of *Scott v. Heliers*, where the words were, *she would have cut her husband's throat, and did attempt to do it*, that an action did lie for these words, because it was matter of great slander, and good cause, for the husband to be divorced 1 *Roll's Abr.* 51 pl. 9.

22. In the case of *Crofts v. Brown*, 3 *Bullst.* 167. these words were adjudged not to be actionable, *Sir Herbert Crofts keepeth men to rob me*, and a case was there cited of *Sir John Harper* and *Sir Francis Beaumont*, where the words were, *that Sir Francis should come to the house of Sir John Harper, and that he and his servants should go about to kill him*, these words were likewise adjudged not actionable. *Cro. Jac.* 56.

23. In 1 *Roll's Abr.* 72. pl. 9. where the words were, *thou must needs be richer than I, for thou didst coin thirty new shillings a day, thou art a coiner of money* ; it is there said to be adjudged that these words are not actionable, because he might be a coiner of money in the mint ; but that case hath been denied to be law, as reported in *Salkeld* 697. in the case of *Speed v. Perry*.

24. Where the words were, *you are a rogue, and broke open a house at Oxford, and your grandfather was forced to bring over 30l. to make up the breach* ; these words were adjudged actionable, for a man who heard them could not intend any other, but that he meant a felonious breaking of the house. *Skinner* 364.

25. In

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25. In an anonymous case, in 3 *Mod.* 280. where the words were, *he stole the colonel's cloth*, it was made a question whether these words were actionable; but it was adjudged that they were so; for here is a charge of felony; and if it had been that he had stolen the *parson's sheep*, or my *Lord's horses*, it would have been certain enough.

Yet though in some of the foregoing instances the words were not actionable, because they were of the import only of an ill intention; however, there are several instances where words that carry a sense of a man's intention only, are actionable.

1. As to say of another, that *he lay in wait at shooter's hill to rob a man*, these words are actionable, because the laying in wait was an ill act. *Pasch. 15 Jac. Lock and Lock's case, 1 Roll's Abr. 44. pl. 13. Popham 128. Lane 98.*

2. It was adjudged in 2 *Bulst.* 206. that no action would lie for these words, *thou art a knave, and hast laid in wait to kill me, and hast hired one W. to kill me*, because here is only a naked intention; *but if it had been that *he hired a man to rob me*, it had been actionable; and so adjudged in *Moor 186. pl. 332.* and adjudged in *Moor*, that as to the principal case it was, that such a man's wife said, that the defendant laid in wait to murder the plaintiff, the words were actionable, by *Wray* chief justice. *Lane 98. Cro. Eliz. 618. Cro. Eliz. 16. Godb. 43. 3 Bulst. 167.*

P* 252.

3. *Thou wouldst have taken my purse from me upon the highway*, held not to be actionable. *Golds. 202.* So *thou wouldst have robbed me*, not actionable, because no act is shewn to be done in order thereto. *Cro. Eliz. 250.*

4. If one says of another, *she sent a letter to my master, and thereby willed him to poison his wife*, these words are actionable. *Pussy and Mountford, Cro. Eliz. 746.*

5. So to say, that the plaintiff had placed a woman in J. S.'s house, with an intent to poison her, was held to be actionable, because they appeared to be maliciously spoken. 2 *Bulst.* 201.

For other cases under this head, see the several cases following.

1 <i>Roll's Abr. 50, 51. Letter Q.</i> <i>Cro. Eliz. 618. Anthony The-</i> <i>bald against Brook. 4 Co. 16 b.</i> <i>Godb. 43. Anonymous.</i> <i>Moor 409. pl. 555. Weeks v.</i> <i>Taylor.</i> <i>Cro. Eliz. 349. the same case.</i> <i>2 Syd. 76. Langly against Clark.</i> <i>1 Jones 195. Anthony Lewknor</i> <i>Vol. I.</i>	against <i>Cruchley. Cro. Car. 140.</i> the same case. 3 <i>Bulstrode 167. Sir Herbert</i> <i>Crofts against Brown.</i> <i>Palmer 278. Bennett's case.</i> <i>Cro. Car. 337. Anonymous.</i> <i>Cro. Jac. 158. Harris against</i> <i>Dixon.</i> <i>Telv. 72. S. C.</i>
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Cro.

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| <p><i>Cro. Eliz.</i> 308. <i>Presion v. Pindar.</i>
 <i>Godb.</i> 202. <i>Anonymous.</i>
 <i>Cro. Eliz.</i> 250. <i>Coles against Haveland.</i>
 <i>Cro. Eliz.</i> 710. <i>Levorsage v. Smith</i>
 <i>3 Lev.</i> 231. <i>Warner v. Cropwel</i> is cited, where there is the same point.
 <i>Yelv.</i> 57. <i>Sir John Harper against Beamond.</i> <i>Cro. Ja.</i> 56. the same case.
 <i>Dal.</i> 62. <i>pl.</i> 174.
 <i>Moor.</i> 63. <i>Sir Edward Bray aainst Andrews.</i>
 <i>Cro. Eliz.</i> 308. <i>Ball against Roane.</i>
 <i>Hut.</i> 122. <i>Glafter against Helliar.</i></p> | <p><i>1 Vent.</i> 323. <i>Anonymous.</i>
 <i>Moor</i> 418, 419, <i>Hillard against Constable.</i>
 <i>2 Leo.</i> 30. <i>Clark v. Green.</i>
 <i>2 Bulst.</i> 206. <i>Murry against—</i>
 <i>Cro. Eliz.</i> 191. <i>Tibbot against Haynes.</i>
 <i>Cro. Eliz.</i> 684. <i>Eaton against Allen.</i>
 <i>1 Bulst.</i> 201. <i>Dean against Eton.</i>
 <i>Cro. Eliz.</i> 746. <i>Paffy v. Mondford.</i>
 <i>Hob.</i> 180. <i>Sir John Sydenham v. Mayo.</i>
 <i>Dyer</i> 26. <i>Russell's case.</i>
 <i>Hetley v. Alice Reading's case.</i>
 <i>Cro. Eliz.</i> 6. <i>Edward's case.</i></p> |
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In some Cases the Certainty of Words does not appear without a particular Averment.

1. If a man says of another, *he is as wery a thief as any in Warwick Gaul*, no action lies for these words without an averment, that there was a thief there. *Hill.* 33 *Eliz.* *Lacy and Reynolds.* *Cro. Eliz.* 214.
 2. So to say of another, *that there never was a robbery committed within forty miles of Wellingborough, but thou hadst thy part in it*; this action will not lie without an averment, that there was a robbery committed within forty miles. *Mich.* 35 & 36. *Eliz.* *Ball and Reane,* *Cro. Eliz.* 308.
 3. So to say, *that if ever a man was perjured, W. was*, held not to be actionable without an averment, that a man was perjured, for the law will not presume so much wickedness. *Noy* 116. *Cro. Eliz.* 342.
- P* 253. *4. If one man says to another, *thou didst kneel upon the body of J. S. so as the blood gushed out of diverse parts of his body, whereby he died*, no action lies, without an averment of the death of J. S. *Mich.* 20 *Jac.* B. R. *Ellis and Knight,* 1 *Ventr.* 117. But it seems *Twifden* said, that the latter opinions have been, that such averment is not necessary, and that the action lies, unless it appears upon the record that the party is alive. 1 *Syd.* 53. 2 *Bulst.* 42.
5. And that seems to be the better resolution; for these words are adjudged to be actionable to say, *thou hast killed a man*, without mentioning any man by name, for that is a great slander. *Pos.* 15 *Jac.* B. R.

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B. R. Cooper and Smith, 1 Roll's Abr. 77. L. E. pl. 3. Popham 128. Bridgman 60. Cro. Jac. 403.

6. But a stronger case appears in *1 Roll's Abr. 49. pl. 8.* to prove the authority of *Twisden's* opinion, which is the case of *Web and Poor*; and the same case reported in *Noy 63. Cro. Eliz. 569.* where a man says of another, *I will call him in question for poisoning his own aunt, and I make no question but to prove that he hath poisoned his aunt,* held that an action upon the case lies without an averment, that she was either dead or poisoned.

7. If a man says of another, *that as sure as God governs the world, and the king this kingdom, so sure hath J. S. committed treason,* an action lies without any averment. *Mich. 13 Car. 2. Day and Clinch, 1 Syd. 53.*

8. But if one man says of another, *thou wast indicted for felony at a sessions holden at (such a place)* no action will lie, without an averment, that he was not indicted. *Pas. 16 Jac. Bland's case. Hob. fol. 219.*

9. So that this averment is only necessary to superinduce a sufficient certainty, where no precise certainty appears in the words, or a necessary intendment to be applied thereto; but wherever a sufficient certainty appears, either in the words or in the discourse, upon which the words were spoken, or a necessary intendment of certainty is to be applied thereto, there needs no averment; as if a man sets forth, *that one J. S. filed a bill in chancery against him, to which he made a true answer;* and that afterwards upon a discourse concerning the same, the plaintiff says to C. then in company, *I'll not talk any more with you, now your two affidavit men are come,* upon which B. the defendant says of the plaintiff, A. *need not say so, for he was absolutely forsworn in his answer to J. S.'s bill;* there needs no averment that he meant as to the bill of which the discourse was had; and the action lies, unless another bill appeared to have been brought by J. S. *Stede and Allen, 1 Roll's Abr. 41. pl. 25. Cro. Car. 321.*

10. So if a man says to another, *that he has killed the wife of J. S. or one of the sons of J. S. or that he has stole his horse,* an action lies without an averment, that he had a wife, a son, or that he had an horse. *Pas. the 15th of king James, Cooper and Smith's case, 1 Roll's Abr. 77. L. E. pl. 2.*

11. So to say, *thou art a thief, and hast robbed my son,* these words are actionable without an averment that he had a son, because it shall be necessarily intended that he had a son, or else he would not have affirmed it. *Noy 55*

In what other cases it lies with or without an averment, see the following cases.

1 Roll's Abr. 77, 78, 79.

Danvers 150, 151, 152.

Poph 128. Cooper against Smith,

Cro. Jac. 423.

Cro. Jac 427. Sir William Brunkard against Segar.

Bridg. 60. Cooper against Smith.

Noy 55. Elwin against Moor.

Lit.

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- Lit. Rep.* 166.
 1 *Syd.* 327. *Baker* against *Mor-*
fuë.
Cro. Eliz. 823, 824. *Talbot*
 against *Cafe.*
Cro. Jac. 331. *Barrons* against
Ball
Stile 66. *Carver* against *Pierce.*
 1 *Vent.* 117. *Phillips* against
Kingston.
Syd. 52. *Dacey* against *Clinch.*
 P*254. *2 *Bullst.* 42. *Billing* and *Knight.*
Hob. Rep. 8. *Yardley* against
Ellill.
 1 *Syd.* 227. *Bull* against *Mayo.*
Hob. 6. *Milles* against *Jacob.*
Cro. Jac. 343. *Jacob* and *Milles.*
Trin. 39 *Eliz.* *B. Webb* and
Poor.
Noy 63.
Cro. Eliz. 569. *S. C.*
Stile 65. ——— and *Long.*
Cro. Eliz. 888. *Darwes* against
Bolton.
Lit. Rep. 166.
 2 *Bullst.* 141, 142. *Painter*
 against *Warn.*
Cro. Eliz. 783. *Heath* against
Pole.
Cro. Eliz. 214. *Peake* against
Pollard.
Noy 116. *Wittam's* case.
- Yelv.* 90. *Heake* against *Moul-*
ton.
Hutt. 72. *Potter* against *Browne.*
Cro. Eliz. 308. *Preston* against
Pinder.
Cro. Eliz. 342. *Baxter* against
Shade.
 2 *Roll's Rep.* 92.
Hob. 219. *Drury* against *Fitch.*
Cro. Car. 40. *Lowe* against *Pla-*
ter.
Brownl. 13. *Adams* against
Fleming.
Hutt. 18. *Bland's* case.
Cro. Jac. 687. *Foster* and
Browning.
Hutt. 72. *Potter* against *Browne.*
Winch 70. *S. C.*
Winch 89. *S. C.*
Stile 221. *Winter* against *Bar-*
nard.
Mich. 13 *Car.* 2. 1 *Syd.* 53.
Dacy v. Clinch.
Badcock against *Atkins.* *Cro.*
 416.
Cro. Jac. 184. *Sir Thomas*
Holt v. Astgrigg.
 2 *Cro.* 126. *Johnson v. Aylmer.*
 2 *Cro.* 331. *Ratcliff v. Michael.*
 3 *Cro.* 177. *Shalmer v. Foster,*
 and his wife,
 3 *Cro.* 443. *Slocomb's* case.

Fourthly, *The Words must be directly applied to the Person thereby charged, and not by Inference or Argument.*

1. As where the words were, *she had a child, and either she or some body else made away with it,* was held not actionable. *Carter* 53, 56.

2. But it is not necessary that they should be spoken of the party by his name, if there is a sufficient *designatio personæ*, as where the person speaking of several defendants, against whom a suit had been brought says, *this defendant, and the other sixteen defendants are the persons who helped to murder Henry Farmer*; this is a sufficient description of the persons, and every one of them well entitled to an action, as it was adjudged in this case of *Foxcroft and Lacy*, *Hob.* 89.

3. If

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3. If *A.* says to *B.* *thou art, a forsworn fellow*; whereupon *B.* asks whether he would say he was perjur'd, and *A.* answers? *yes, if you will have it*, it was held no action lies. *Levermore v. Martin*, Cro. Eliz. 297.

4. Where a person, without any precedent communication, says, *one of the servants of J. S.* (he having several) *is a notorious felon or traitor*, here, for the incertainty of the person, no action lies. 4 Co. 17.

5. Where a man said, *my brother is perjured*, these words were held actionable, and a sufficient *designatio personæ*, with an averment, that they were spoken of him. But *Yelverton* was of another opinion, for it might be he had diverse brethren, and at that rate, every one of them might have an action, and the *innuendo* the plaintiff, or any averment, will not import a slander to be certain which was not certain before; for says he, actionable words ought to import in themselves precise slander without ambiguity, so that every one that hears them might intend of whom they are spoken. But *Williams* was of another opinion; for says he, the plaintiff sets forth that these words were spoken of him; and the jury having found the defendant guilty, it is sufficiently ascertained to the court they were spoken of no other; and the plaintiff had judgment *Wiseman v. Wiseman*, Cro. Jac. 107.

*6. If *A.* says to *B.* *one of us two is perjured*, and *B.* says to *A.* *P* *255.
it is not I. and *A.* says again, *I am sure it is not I.* *B.* shall have an action for these words, for the subsequent words do apparently shew that he intended *B.* to be the person perjured. 1 Roll's Abr. 75. Letter C. pl. 4.

7. It is said in *Carter* 56. where the words were *A. or B. hath killed J. S.* that *A.* may have an action, averring, that neither he or *B.* killed him.

8. Where words are uncertain of whom they are spoken, there must be an averment that they were spoken of the plaintiff.

9. Where the words are in themselves certain, so that it may be intended that the speaker intended a person certain, there they may be made actionable by an averment. *Mich. 3 Jac. B. Wiseman's case*, 1 Roll's Abr. Cro. Jac. 107.

10. If one man says to another, *my master Mr. Browne hath robbed me of all my goods*, *Browne* may have an action against him, averring that he spoke the words of him, without averring that he was his master, for the averment, that he spoke them of him implies as much. *Browne and Lane*, 1 Roll's Abr. 1 Brownl. 10. 1 Syd. 52. Cro. Jac. 443.

11. If a man says to *A.* *thy husband and his master have stolen my wood*; the master shall not have an action without an averment that he was master to the husband of *A.* though he avers generally the words spoken of him. *Trin. 11 Jac. 1. Liford and Stamp*, 1 Roll's Abr. 75. pl. 3. S. C. Cro. Jac. 433.

12. But

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12. But it is to be observed in the case of *Harvey v. Chamberlain*, where the words were, *thy son is a murderer*, without shewing that the father had no other sons, are not actionable; for if he hath others it is uncertain which he intended; and this diversity was taken by the court, that if one says to a married woman, *thy husband*, or to a servant, *thy master*, or to a son, *thy father*, there, if the words will bear an action, there needs no averment, because there is a certain description of the party; for she can have but one husband, nor the servant properly but one master, nor the son but one father; otherwise is it where the words are not a description of the individual person, but may be attributed to many, there an averment ought to appropriate the words to the person of the plaintiff; but if the words first above-mentioned had been, *thy son William*, &c. it had been certain enough. *Palmer* 283.

Where Averments are Necessary, and what are proper Averments in the like Instances, see the following Cases.

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| <p>1 Roll's Abr. 80, 81, 12.
 2 Bulstr. 32 Lifard against Stamp.
 Allen 32. Peirson against Dawson.
 Moor 63. pl. 174. Bray and Andrews.
 Dall. 66.
 1 Roll's Abr. 70, pl. 48. S.C. but the same point does not appear.
 1 Roll's Rep. 227. Scorie alias Scorer against ———
 Cro. Eliz. 861. Taylor against How.
 Cro. Ja. 240. Beaumont against Hastings.
 Winch 112 Crompton against Philpot.
 Cro. Ja. 673. Smith against Ward
 *256. Raym. 86, 7. Terry against Hooper and his wife.
 Syd. 52. Dacy against Clinch.
 Stile 150. Raph against Davie.
 Cro. Ja. 443. Brown against Low.
 3 Bulstr. 249. Lawknor against Godman.</p> | <p>Palmer 263. Harvey against Chamberlaine. Cro. Jac. 635. S. C.
 Cro. Eliz. 343. Brent against Ingram.
 Stile 46. Person against Dawson.
 Cro. Ja. 107. Wiseman against Wiseman.
 Godb. 391. Symm's Case.
 1 Roll's Abr. 75. pl. 5.
 Aish and Gerish M. 8 Car. B. R. 1 Roll's Abr. fol. 80. pl. 10.
 Cro. Car. 318. Green against Lincoln.
 1 Jones 326. S. C.
 1 Roll's Abr. 47 pl. 6.
 Cro. Eliz. 496. Johnes against Davers.
 *1 Roll's Abr. 74. pl. 1.
 Hill. 9 Car. B. R. Nicholls and Brampton and his wife. 1 Roll's Abr. fol. 82. pl. 15.
 Trin. 11. Jac. 1. B. R. Ireland and Gardner. 1 Roll's Abr. fol. 82. pl. 16.
 21 Jac. B. R. Foxcroft and Lacy. Hob. 89.</p> |
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1 Roll's Abr. 72. pl. 5. 75. pl. 4.	1 Roll's Abr. 57. pl. 36.
Cro. Jac. 557. Fleetwood against Curle.	6 Mod. 104. Graves and Blanchett.
Hob. 67. S. C.	2 Shower 59. Osbourne and Rey.
Palin. 69. S. C.	
March 82.	2 Shower 153. Anonymous.
Godb. 341. Wheeler and Appleton's Case.	

Fifthly, *The Words must be sensible and plain, or capable of being made so with a proper Averment, and must be spoken in the Hearing of some Body, and in a Tongue, that some of the Hearers do, or may understand.*

1. Where the words were, *thy brother was whipped about Taunton Crofs for stealing sheep, or burned in the hand or shoulder*; these words were adjudged uncertain, and not actionable. 3 Cro. 283.

2. In the case of *Bonfield v. Linton*, the words were, *he is as very a rogue as ever went upon the highway, he killed a man on board a ship, and if he had not bought it off with a piece of money, he had suffered for it*; it was moved, that this shall not be intended a felonious killing; but adjudged, that as the jury have given a verdict, it must be intended a felonious killing was meant by the words, *that he would have suffered for it.* 2 Shower 77. Case 61.

3. Where words are spoken in a language that the people do not understand, they are not actionable. *Cro. Eliz. 496. Johnes v. Dancers*; and if they are not spoken in *English*, it must be averred that they were understood by the hearers. 1 Cro. 865.

4. Where the words were, *thou art a main-sworn lad*, they were held actionable, because at the place where they were spoken they were well understood to signify, that the person of whom they were spoken was perjured. *Slater v. Franks. Hob. 126. 1 Brownl. 9. 2 Cro. 6. 3 Cro. 417.*

5. Where the matter of slander was for calling a man *idoner*, which in *Welsh* signifies, that the person was perjured, it was adjudged actionable, though there was no averment, what was the import of the word; but it was said that it was spoken in the presence of several persons that understood *Welsh*, and therefore the slander was well enough laid. *Hob. 126. Anonymous.*

6. And in the same case it was said, that in the case of one *Tuck*, it was adjudged actionable, where a man called another *a healer of felons*, without any averment how the words were understood, because the court was informed, that in the place where the words were spoken, it was well understood thereby, that the party of whom they were spoken was a concealer of felon.

7. See

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7. So where the words were, Coles *hath strained a mare*, innuendo that he had *buggered* her, they were adjudged actionable after a verdict for the verdict shall be intended to have found that to be the meaning of the words in the place where they were spoken. Cro. 250. Coles v. Haveland,

P *257. *An averment likewise is necessary where words are uncertain in their signification, or not well known to the judges to be words of slander.

1. This averment is necessary to make words actionable, by reason of their being understood, in the place where they were spoken, to be tantamount to words that are actionable, which otherwise would not be so; as these words following, spoken of a merchant, being averred, that in London they bear the same sense, as to call a man a *bankrupt*, were adjudged actionable, *thou art a base knave, a cheating knave, thou hast cozened me of 400l. thou art a beggarly knave, and I will make thee fly England.* 1 Roll's Abr. 86. pl. 2.

2. Yet in the case of *Moon and Axe*, 1 Roll's Abr. 86. pl. 3. reported in *March* 15. by the name of *Mead and Axe*, these words were spoken of a dyer, *Thou art not worth a groat*; and tho' it was averred, that in *Exeter*, where these words were spoken, it is tantamount, as if he had said, *thou art a bankrupt*; the court held the words not actionable, and that as they had a plain and intelligent sense and meaning to every man, the averment was idle and to no purpose, and shall not enforce the words contrary to their known sense.

3. But these words spoken of a shoemaker, *it is no matter who hath him, for I warrant whosoever hath him, he will cut him out of doors*, with an averment, that where they were spoken, they amounted to as much as if he had said, *he would undo his master*, were adjudged actionable. *Ellis v. Hunt.* 1 Roll's Abr. 86. pl. 4. *March* 1, 2.

4. If an action is brought for slander according to the phrase of the country in that case there needs no averment that they bear such signification; for the judges are intended to know the phrase of speech of every country; as to say, *thou art a healer of felons* is actionable in the west of *England.* *Hob.* 126. so to say, *thou art an out-putter*, was held actionable in *Westmoreland.* 2 Bulst. 146.

2 Bulst. 145. 146. Steeneman	Haveland.
against <i>Richardson.</i>	<i>Moor</i> 418, 419. <i>Hilliard</i>
<i>Palm.</i> 441. <i>Daubny and Martin.</i>	against <i>Constable.</i>
<i>Dal.</i> 97.	<i>Hob.</i> fol. 126. <i>Slater</i> against
<i>Cro. Eliz.</i> 250. <i>Coles</i> against	<i>Franks.</i>
	<i>Yelv.</i> 153. <i>Webbin</i> against
	<i>My er</i>

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Mayer.	Hunt, 1 Roll's Abr. fol. 86. pl. 4.
Noy 133 Pridam against	1 Roll's Abr. 60. pl. 8.
Tucker.	Trin. 43 Eliz. 3024. William
Palm. 65. Mich. 17 Jac. B. R.	Verch How. 11 and Evan George,
Yelv. 154. Pridham v. Tuck-	1 Roll's Abr. fol. 86. pl. 5.
er.	Stile 263. Ross against Law-
1 Roll's Abr. 61. pl. 13.	rence.
Pasch. 15 Car. B. R. Moon	Hob. 191. Gibbs against Jen-
and Axe, 1 Roll's Abr. 86. pl. 3.	kins, Herl. 175.
Ravm, 184 Drake against Hill.	Hutt. 8. Gibbs against Davie,
Pasch. 15 Car. B. R. Ellis and	

*Subsequent words shall sometimes be explanatory in mitigation,
and sometimes in Aggravation of the former.*

1. As if one man says to another, *thou art a thief, for thou tookest my beasts by reason of an execution, and I will hang thee*, these words are not actionable, because it plainly appears that the theft he meant was the taking of his goods by the execution. *Mich. 7 Jac. Wilk's case. Hob. 77. 1 Roll's Abr. 51. Letter R. pl. 2.*

2. So to say, *thou hast ravished a woman twice, and I will make thee stand in a white sheet for it*; these words are not actionable, because it is plain, the defendant did not mean such a ravishment as is indictable as such. *Godb. 287. Cro. Jac. 666.*

* 3. So for a man to say, *I have felony to lay to thy charge, for thou would'st have robbed me*; as words of a man's intention to rob another are not actionable, unless some overt act is published to have been done, as a lying in wait for that purpose; so the felony here meant, was only the opinion the speaker of the words had, that the plaintiff had such an intention, and therefore not actionable. *Cro. Eliz. 250.*

4. Yet sometimes the subsequent words are explanatory in aggravation; as for example; tho' the word *whore* spoken out of the city of London hath been held not to be actionable; yet to say *you are a whore, and I can have a better whore than you for a groat, and you get your living by your tail*, hath been adjudged actionable, because it implies a continued course of fornication and adultery. *Gardiner and his wife against Parke, Hard. 107.*

5. Where subsequent words have been held to enlarge the slander in the words precedent, *vide Yelv. 154. Newlyn v. Fussell*, and there is a diversity there taken, where words are uttered *continua voce*, and where they are spoken at several times, and upon several occasions; as to say, *thou art a felon, for that thou stolest my apples off my trees*, are not actionable, by reason of their being spoken at one and the same instant; for there the subsequent words qualify and lessen the force of the former; but if a man calls another

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other a *thief*, and a slander by says, *beware what you say*, and the other faith, *I will justify he is a thief, for he stole my evidence*, this is but *inepta ratio* of the first words, and voluntarily proceeding from the party, and therefore they came too late to qualify the former words. *Ibidem*.

6. And it is said in the case of *Whitacre v. Hillidell*, reported in *Allen* 7. that where words are a plain and direct slander, the subsequent words, that ought to take off the force of the former, ought to carry in them a strong intendment, that they were spoken in a sense not actionable; for it is very unreasonable that one should slander another in general words, and then mitigate them by words of a doubtful interpretation.

Other cases applicable to this head, see.

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| <p>Mich. 4 Jac. B. R. Minors and
Lydford. 1 Roll's Abr. 51.
L. R. pl. 1.
Hob. Rep. 106. Cro Jac. 114.
Hob. 77. Adrian Coote against
Adrian Gilbert.
1 Brownl. 2. Male against
Ket.
Cro. Jac. 144. Taylor a-
gainst Perkins.
All 11. Whitacre against Hil-
lidell.
Noy. 135. Ayres against
Oswall.
2 Brownlow 280. Fleming
against Jales.
2 Bulst. 141, 142. Painter
against Warn.
Cro. Jac. 231. Gyer against
Ormsted.
Goult. 56. Norman's case.
Stile. 115. Wainwright
against Whitly.
Cro. Jac. 65, 66. Robins
against Hildredon.
1 Yelv. 34. Lewis against
Aston.
Cro Jac. 204, 5. Powell
against Hutchins.
Hut. 113. Harbert against
Angell.
All. 31. Dutton against Eaton.</p> | <p>2 Roll's Rep. 380. Ayrye v.
Higgins. Winch 4. Godard
against Gilbert. 1 Roll's Abr.
52. pl. 6.
Cro. Jac. 114. Minors a-
gainst Leeford.
Godb. 287. Bridges and
Milles.
Cro. Jac. 666. Ridges against
Milles.
Cro. Eliz. 250. Stoner
against Audley.
Mich. 9. Car. B. R. Red-
head and Smith.
1 Roll's Abr. 47. pl. 7 Hard.
7.
Mich. 23. Car. B. R. Yer-
worth and Pearce.
1 Roll's Abr. 70. pl. 49.
Moor 396. Castleman against
Hobbs. Owen 57. S. C.
Hob. 331. Cleark against
Gilbert.
1 Jon. 11. Goddard against
Gilbert.
Popham 152. Gilbert against
Hopton's case.
2 Jac. B. R. Kelham and
Mandi. Cro. Jac. 39. Kellam
against Manesby.
Cro. Jac. 673, 674. Smith
and Ward.</p> |
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*Stile 231. Gibbs against Price. Stile 66. Carver against Pierce. Cro. Jac. 687, 688. Foster and Browing. 3 Bullst. 465, 266. Frost and Ayre's case.	Raymond 12. Rawlins against P * 259. Hill. March 58. Anonymous. Cro. 33 King against Bag. 2 Cro. 536 Gainford and Tuke's case.
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And in some Cases Words shall have a favourable Construction.

1. Where words are dubious, and may receive a double interpretation, the one way, that they shall be actionable, and the other way not, they shall be taken *in mitiori sensu*, so that they shall not be actionable. *Mich. 15 Jac. B. R. Gardener and Spurdance's case, Cro. Jac. 438.*

2. But where the words are not doubtful, nor cannot in the common acceptance of them receive a double construction, there they shall be taken according to the common acceptance; and so, if in common acceptance they found in slander, they shall be actionable, but shall not be strained to any foreign construction to make them so, 3 *Lev. 166. the same case, in Skinner 153. Naden and Micoock.*

What other words reported in the books fall under this head, see the following cases.

Cro. Eliz. 400. Meggs and Griffith. Goult. 138. the same case. Moor 408. pl. 552. the same case. 1 Roll's Abr. 72. pl. 4 fol. 73, 74. Cro. Eliz. 569. Webb against Poor. Noy 64. Thimblethorp's case. Godb. 181. Carle's case. Cro. Jac. 306. Toofe and his wife, against St.— Cro. Jac. 423. Cooper and Smith. Cro. Eliz. 823. Talbot v. Cafe. Cro. Car. 489. Wilner and Hold. Moor 428. Nicholas and Bad- ger. Owen 33. Winter and Barn- ham. Moor 29. Anonymous.	Mich. 11 Jac. B. R. Foxcroft and Lacy. Hob. 89. Bayle against Gird. Stile 245. Davis and Ockham. Pasch. 5 Jac. B. R. dame Mo- rison and Cade, 2 Cro. 162. Pasch. 7 Jac. B. Parram and Roe. 1 Roll's Abr. 72. pl. 8. Pasch. 8 Jac. B. Ward and Poll, Godb. 167. Godb. 375. Mill's case. 2 Roll. Rep. 104. Kamelford and Tuke. Cro Eliz. 629. Blake against Stanley. Godb. 391. Symm's case. 2 Ven. 172. Anonymous. 3 Lev. 166. Watter and Beaver. Hill. 17 Jac. B. R. Searl and Maunder. 2 Roll's 141. Hur. 86. Drury and Fitch. Hob. 219. the same case. Peph. 150. Searle and Maun- der, 2 Roll's Rep. 141.
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Trin.

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| <p>Trin. 21 Jac. B. R. Wheeler and Popleston, 1 Roll's Abr. 72. pl. 11.</p> <p>Godb. 339. the same case by the name of Wheeler v. Appleton.</p> <p>2 Roll's Rep. 342. the same case by the same name.</p> <p>Poph. 187. Reynor and Hal-
ler.</p> <p>38 Eliz. B. R. Denyson and Burgh.</p> <p>Cro Eliz. the same case in Gould 143. by the name of Brough v. Dennison.</p> <p>Cro. Eliz. 783. Heath v. Poole.</p> <p>1 Bulst. 112. Stowe and Hol-
land.</p> <p>Cro. Eliz. 224. the Lady Ratcliffe against Shubley.</p> <p>2 Cro. 413 Lewis and Wal-
ter's case.</p> <p>Pasch. 38 Eliz. B. R. Browne and Brinly. 1 Roll's Abr. 73. pl. 13.</p> <p>Moor 407. pl. 457. Browne and Bruckley.</p> <p>Owen 58. the same case.</p> <p>Moor. 409. pl. 556. Carter's case.</p> <p>Owen 56. the same case.</p> <p>Cro. Eliz. 424. Charter and Hunter.</p> <p>Hut. 14. ——— the same case.</p> <p>Mich. 17 Jac. B. Bradshaw and Walker. 1 Roll's Abr. 73. pl. 15.</p> <p>Hob. 249. the same case.</p> <p>Palm. 29. the same case.</p> <p>1 Brownl. 13. the same case.</p> <p>Hut. 34. the same case.</p> <p>Hill. 8 Car. B. R. Langley and Bradshaw, 1 Roll's Abr. 73. pl. 16.</p> <p>P *260. *Trin. 16 Car. B. R. Blumly and Rose.</p> | <p>Hut. 72. Potter against Browne.</p> <p>In Anonymous 113. Harbert. v. Angell.</p> <p>Winch 70, 89.</p> <p>1 Syd. 35. Lizard and Clare.</p> <p>Godb. 89. Eglinton and Aun-
sell's case.</p> <p>Cro. Eliz. 192. Sir William Walgrave against Agas. 1 Leon. 335.</p> <p>Noy 47. Hall and Hemisley.</p> <p>Stile 115. Wainright and Whetley Co. 4 20.</p> <p>Yelv. 21. Barham and Nether-
salf.</p> <p>Noy. 115. Bareham and Ne-
thersalf.</p> <p>Cro. Eliz. 834. Lovet against Hawthorn.</p> <p>Mich. 15 Car. B. R. Hasel and Auman. 1 Roll's Abr. 75. pl. 20.</p> <p>Yelv. 136. Dromant and Westofer.</p> <p>Godb. 287. Bridges and Mill's Cafe.</p> <p>Stile 22, 23. Hamond and Kingsmill.</p> <p>Hill. 2 Car. B. R. Wood and Merrick.</p> <p>Noy 124. Bayly and Child.</p> <p>Hob. 305, 326. Poland and Mason. 331. Clarke v. Gilbert.</p> <p>1 Brownl. 18. Gowland and Mason.</p> <p>Hut. 38 Mason and Thomp-
son.</p> <p>Mich. 8 Car. B. R. Lawrence and Woodward. Cro. Ja. 277.</p> <p>10 Jac. B. R. Loveston and Cawdry. Cro. Car. 277.</p> <p>Cro. Eliz. 351. Lyne and Backhouse.</p> <p>1 Jon. 302. Smith and Hogf-
head.</p> |
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1 Bulst. 112. Stowe and Hol- land.	Cro. Eliz. 746. Ball against Bridges
Cro. Jac. 315 Holland and Stoner.	Cro. Eliz. 297. Butler against Paynter.
Godb. 181. Clarke's case.	Godb. 89, & 90. Mich. Cro.
Yelv. 145. Gold and Robins.	Eliz. 52. Morgan and Kiffe.
Cro. Eliz. 890. Latham and Humphrey. Hill. 44. Eliz. rot.	4 Cro. 13. A.
350.	Cro. Jac. 268. Thomas Rich against Holt.
Cro. Jac. 312. Lewis and Cawardley.	Cro. Jac. 629. Bennet against Tabram.
Godb. 202. Anonymus.	Palm. 278. Benner's case.
Skykker 364. Somers and House.	Cro. Jac. 58 Sir John Hollis against Briscoe and his wife.
2 Bulst. 216. Charles Crook against Avery.	Yelv. 64. Sir Hollis v. ———
Gouldf. 48. Anonymus.	Trin. 15 Jac. Gibbs and Jenkins. Hob. 191. Noy 19.
Godb. 89. Mich. 28, 29.	Hetl. 175.
Eliz. K. B.	Palm. 64. Johnson v. Leman.
1 Roll's Rep. 427. Sir John Sidnam v. Mayo.	Hut. 8. Gibs against Davie.
3 Bulst. 260. the same case.	2 Roll's 136. Clarke's case. v. Dorchester.
Pasch. 30 Eliz. Prouse and Cary. Cro. Eliz. 43.	Dal. 9, 10. Anonymus.
1 Leon. 101. the same case.	All. 37. Eels v. Smith.
Trin 33. Eliz. Gastrel and	Winch 40. Auditor Curle's case.
Townsend. Cro. Eliz. 239.	Mich. 13 Car. 2. Lewes and Roberts. Hard. 203,
2 Bulst. 10. Miller against Buckdon.	Raym. 33. Tibbs against Smith.
Dal. 89. Anonymus.	1 Ven. 3. Twistleton v. Hobs.
Cro. Car. 489. Wilner aginst Hold.	Pasch. 23 Car. 2. Philips and Kingston. 1 Vent. 117.
2 Syd. 71. Skelton against Earth.	3 Bulst. 249. Lewkner and Godman's case.
1 Bulst. 109. Tabbe against Matthew.	
Cro. Eliz. 251. Stadleton and Frier.	

*In some cases the action will lie, notwithstanding there is a repug-
nancy, either in the words themselves, or made so by matter
apparent in the record.*

1 As if one says of a widow having children born in wedlock,
that she is a whore, and her children are bastards, by which she lost
her marriage with J. N. now tho' the children born in wed'ock P *261.
cannot

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cannot properly be bastards, yet they may be reputed so; and the action will lie. *Cro. Car.* 322. *Bryan and Cockman.*

2. *Thou wast forsworn in Carpenters Hall, and didst rob the Hall,* these words are actionable; tho' properly speaking the hall cannot be robbed. *Cro. Eliz.* 788.

3. But if one says to another, *thou hast murdered J. S.* and it appears that *J. S.* is alive, no action will lie. *Hill.* 11 *Jac. Pett's case, Jones* 141. *Popham* 187. 4 *Co.* 16. a. 3 *Buist.* 167. *Litt.* 310.

4. Yet see the case of *Smith and Williams*, where one said of another, *he is a rogue, and robbed the Hockley Butcher*; and it was not averred that there was an *Hockley* butcher. But says the Lord Ch. Just. *Holt*, then the fault is the greater, and 'tis a double crime. *Comb.* 247.

5. Where words were spoken by a feme covert, and she said of the plaintiff these words, *thou hast stolen my faggots* (meaning the faggots of the defendant) tho' it was objected that it was repugnant, and that the defendant as a feme covert could not have any faggots, yet the action was held to lie. *Palmer* 358. *Strong and his wife against White and his wife.*

Cro. Jac 101, 102. *Turnor*
again *Sir Edward Darcie.*

1 *Roll's Rep.* 286. *White*
against *Brough.*

Latch 219. *Priour* against
Colbold.

1 *Roll's Abr.* 78. pl. 2.

1 *John.* 141. *Keymer* against
Hallet.

Poph. 187. reported by the
name of *Reynor* against *Hallet.*

Latch 159. *Keymer* against
Clarkvel Hally.

Stile 424, 425. *Stevens*
against *Ask.*

Cro. Jac. 323. *Matthew*
against *Crafs.*

Winch. 39, 40. *Auditor*
Curle's case.

Palm. 441. *Daubny* against
Martin.

Sixthly, *The matter contained in the meaning of the words must be false, and spoken maliciously on purpose to slander, and the thing charged must be possible.*

1. And therefore if the matter be true, the defendant may justify the speaking of the words; but if after the fact committed there was a pardon, the words are actionable still. 1 *Roll's Abr.* 88. pl. 6. *Moor* 863. pl. 1187.

2. If *B.* says, that *J. S.* said, that *J. D.* said a certain scandalous thing that will bear an action, tho' this be false; yet if *J.* said, that *J. D.* said the words, no action lies against *B.* for he has named his author, viz. *J. S.* 1 *Roll's Abr.* 64. pl. 3.

3. But where a man says, *a woman told me that she heard one say that Meggs's wife had poison'd Griffin her first husband in the mess of milk;*

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milk; these words were adjudged actionable. 1 Roll's Abr. 64. pl. 4.

4. Where the defendant said of the plaintiff, *I have heard the plaintiff was hanged for stealing a horse*, and upon evidence it appeared, the words were spoken in grief and sorrow for the news, and *Hob.* directed the plaintiff to be nonsuited. 1 Lew. 82.

5. If one says of another, *that he is a witch*, no action lies, they being but words of passion. 1 Roll's Abr. fol. 45. pl. 15.

6. But if one says to another, *thou art a witch, and an inchanter, and thou didst bewitch the children of J. S. and they are wasted and destroyed*; an action will lie, for he shews his intention to be that he is a witch, and hath been guilty of doing an injury to a person. 1 Roll's Abr. fol. 45. pl. 18. 1 Brownl. 2. *Stone v. Roberts*, Godb. 341. *Noy* 22. *Hutton* 13. *Moo.* 906. 2 *Leon.* 30. 4 *Leon.* 92.

7. Where the words were, *It is no marvel she comes not to church, for it is thought she is with child, and I fear it is too true*; these words were held not to be malicious words, tho' the declaration set forth, that the plaintiff lost her marriage. *Yelv.* 113. *Brinsby v. Balgy*. P* 26 2.

8. Where a man came to a justice of peace, for a warrant against the plaintiff, and then said, *Sir, I will charge him with flat felony, for stealing my ropes from my shop*; and it was resolved, that as these words were spoken to a justice of peace, when the defendant came for a warrant, which was lawful, no action would lie. *Ram. v. Lamley, Hutton* 113.

Note; By the statute of Limitations of the 31 Jac. 1. cap. 16. This action for words must be commenced within two years after the words spoken.

And by the same statute, in actions of slander, if the jury find, or assess the damages under 40s. the plaintiff shall recover no more costs than damages.

There is another species of this action, which not being treated of by my Lord Rolls, or Mr. Danvers, in either of their abridgments, I beg leave to quote a few cases incident thereto.

1. A libel is the strongest and greatest degree of scandal, and does not die like words which may be forgot, but *Litera Scripta manet*; and therefore a greater degree of latitude is bestowed, not only in construing it criminal, but in the extensiveness of the action; for an action for words is confined to the person of the offended, but the cause of action for scandal in a libel survives. 5 Co. 125. 12 Co. 134.

2. And this offence was punishable heretofore in the star chamber, and is now indictable in the court of King's Bench.

3. It may be by writing or without writing, (*that is to say*) by picture, wherein the party is painted in any ignominious or reproachful

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proachful manner, or by signs; as when one does affix a gallows at the door of the party. 5 Co. 126. 1 Cro. 125. 2 Brownl. 152. Popham 139, 140. Hob. 153, 384, 837. Hetly 10

4. And differs from scandalous words in this respect, if a man repeats what a man said of another, tho' the words are scandalous, yet no action lies for that; but otherwise in the case of a libel, for maliciously repeating or finging the words contained in a libel in the presence of others, or delivering over a copy thereof to another, to the intent to scandalize the party, an action lies for it.

5. And in the case of a libel it matters not, whether the words contained therein are true or false, or whether the party upon whom the same is made be of good or ill report, or whether it be divulged secretly or openly. Hob. 253. 5 Rep. 125.

6. And if one writes a letter, containing scandalous matter against another, and sends it to a third person, this may be a libel, as is reported in the case of *Peacock v. Reynall*, in 2 Brownl. 152.

7. Scandalous matter is not absolutely necessary to make a libel; 'tis enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous: as for instance, an action was brought by the husband for riding Skimmington, and adjudged that the action lay, because it made him ridiculous, and exposed him. 3 Salk. 226.

8. The libel in the information or declaration must exactly agree with the libel itself, for tho' words are transient, and vanish in the air as soon as spoken, and there can be no tenor of them, therefore an identity is not required; and tho' the jury find some omissions, it will be sufficient if some be proved, and in such case the plaintiff shall recover; but when a thing is written, tho' every omission of a letter may not make a variance, yet if such omission makes a word of another signification, it is fatal. 3 Salk. 225.

P. *263. *9. A Defamatory writing expressing only one or two letters of a man's name, if it be in such a manner that from what goes before, and follows after, it must be understood by the natural construction of the whole, to signify and point at such a particular person, it is as properly a libel, as if the whole name was expressed at large. Trin. 12 *Annae*, *Hawkins's Pleas of the Crown* 194.

10. C. forged an order of chancery, in which were several defamatory expressions against the plaintiff, and at the end draws a pillory, and subscribes it for sir J. H. and his forsworn witness by him suborned, the court held that, tho' no action lay for forging the order, and entire damages were given, yet that was only an inducement, and an action was held to lie for the latter; and the cases there cited were, that to say a man is a dishonest man is not actionable, but yet to publish it, or set it upon posts, will make it actionable. *Skinner* 124.

11. The copying of a libel is criminal, and writing a copy without authority, is writing a libel. 417. He that writes the libel

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libel is the contriver, and having a written copy of a known libel is evidence of publication. *The King v. Bear.*

And as this is an offence generally punished by information or indictment, I omit treating any more on this head.

Of Slandering a Title.

1. Whoever will bring an action for slandering a title of land, it hath been said, ought to shew that he hath a good title. *Palm.* 530.

2. But see the case of *Marvin v. Maynard*, in 1 *Cro.* 419. where it was held, that the plaintiff having said he was seised of the manor of *Upton Gray*, that the defendant, to slander his title, spake these words, Mr. *Marvin* (innuendo *the plaintiff*) *hath not any title to Upton*; here it was said to be sufficient, tho' the plaintiff does not shew what estate he had.

3. In an action for slandering a title, *particular damage* ought to be alledged; as that the plaintiff might have sold or let his estate to some person or other, who after speaking such words desisted. *Palmer* 529. 3 *Cro.* 140. *Larwe v. Harwood.*

4. And where the declaration was, that the plaintiff had a mind to convey part of his land for the advancement of his son, and to lease out another part for years, and the defendant knowing of it, spoke these words, Mr. *Swead* *hath no more right to the farm of Colenorton than a mere stranger*, and avers, that a stranger had not any right, by which words he was so endamaged, that he could not convey the land for the advancement of his son; it was held that the plaintiff had not any cause of action, for he did not say he was about to sell his land, nor did he shew any particular damage, and his intention set forth, as above, would not make it good. 1 *Roll's Rep.* 244. *Swead. v. Badley.*

5. If the defendant claimed any title himself in the same lands, the words are not actionable, as in the case of *Lovett and Weller*, 1 *Roll's Rep.* 409. where these words were spoken to J. S. having communication of some land then in the plaintiff's possession, *take heed how you buy it, for it is mine, if every man had his own, and I will spend 20l. but I will have it*, these words in arrest of judgment were held not actionable.

6. Where a man is about to sell his land, and J. S. pretends to a title therein, and shews a lease for it, and it is a counterfeited one, which he knows to be so, the words are then actionable. 4 *Co.* 18. 1 *Co.* 175.

7. If a man slanders the title of another man, he cannot clear himself by a pretence of a title in himself, which he cannot maintain. But if he say himself at the same time, that he himself hath a title, no action lies. *Palm.* 531.

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8. Where

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8. Where a man said, *I would not wish any man to deal with the land, for I know one that hath a good title to it, and the parties will not part with their interest*; and the defendant justified, that he himself had a lease in reversion of parcel, and at will in another parcel; it was agreed by all the judges, that if one said, *he himself had a title to another's land*, the action would not lie, although he had no title; but when he said words, purporting that another had a title, whether he could apply it to himself by his justification was a question; and Popham said he could not, but Gauder and Fenner to the contrary. 1 Cro. 427.

For other cases applicable to this species of slander, see hereafter.

What other words not herein before inserted have been adjudged actionable, and what not, are to be found in the following cases.

First, What words have been held actionable.

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| <p>Charging the plaintiff with Treason, misprision of Treason, or want of allegiance.</p> <p>1 Keble 14. Green v. Green.
 122. Dolbin v. White.
 469. Booth v. Leach.
 814. Edwards v. ———</p> <p>2 Keble 47. Hingstone v. Peck.
 478. Hingstone v. Peck.
 463. Lowther v. Mowson.</p> <p>1 Cro. 153. Bellingham v. Minors.
 171. Ward v. Throne.
 251. Stapleton v. Frier.
 191. Waldgrave v. Agas.
 268. Fowler v. Aston.</p> <p>2 Cro. 275. Beristad v. Bresse.
 406, 413. Lewis v. —
 1 Roll's Rep. 444. S. C.
 3 Bulstr. 225.
 424. Lewis v. Cooke.
 202. Smith v. Turnor.</p> <p>Hard. 203. Lewis v. Roberts.
 Allen 35. Mark v. Cubit.
 Hob. 180. Sydenham v. May,
 2 Cro.
 407. 1 Roll's Rep. 48, 49.
 2 Roll's 17, 18. 1 Roll's
 Rep. 427.</p> | <p>Hutton 131. Hutton v. Hanson.
 2 Lut. 1295. Howe v. Perry.
 1 Sid. 103. Booth v. Seale.
 381. Dalton v. Sadd.
 Stile 400. Trevilian v. Welman.
 435. Lamplew v. Hewson.
 Yelv. 107. Blanchflower v. Atwood.</p> <p>Ray 20. Austen v. Mander.
 23. Harris v. ———</p> <p>Godbolt 153. Anonymous.
 Hardr. 203. Lewis v. Roberts.
 Modern Cases 283. Fry v.
 in L. and Eq. 3 Carne.
 1 Sid. 53.
 131. Hawk v. Rowe.</p> <p style="text-align: center;"><i>With Murder.</i></p> <p>1 Cro. 239. Gastrell v. Townsend.
 308. Preston v. Pindar.
 317. Godfrey v. Mour.
 352. Wilmer v. Hold, 3
 Cro. 489.
 672. Slade v. Allen.
 823. Talbott's case.
 191. Tibbott v. Hayenes.</p> |
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- 2 Cro. 56. Sir John Harper
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306. Toofe's case,
423. Cooper v. Smith,
Poph. 128. Bridg. 60.
Moor 286. Anonymous.
Hardr. 203. Lewis v. Roberts.
3 Cro. 318. Green v. Lincoln.
Hetley 69. Watson v. Vanderlash.
Popham 187. Raynor v. Hallett.
Stile 65. Long's case.
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2 Show. 77. Bondfield v. Lin-
ton.
1 Keb. 253. West v. Phillips.
35. Brown v. Charlton.
3 Keb. Greene v. Warner.
2 Bulst. 42. Billing v. Knight.
Larch 159. Keymer v. Clarke.
3 Lev. 171. Williams v. Lewis.
T. Jones 211. Nailor v. Clarke.
Modern Cases in Law and Equity,
24.
Burton v. Heyward and his
wife.

With Poisoning.

- 1 Cro. 400. Meggs v. Griffith.
569. Webb v. Poor.
1 Cro. 747. Passie v. Mundford.
2 Cro. 438. Gardner v. Spur-
dant and his wife.
343. Jacob v. Mills.

With Theft or Robbery.

- Sibthorp's case, W. Jones 366.
3 Cro. 417. S: C.
1 Cro. 214. Lacy v. Reynolds.
225. Guildeslew v. Ward.
224. Lady Ratcliff v. Shub-
ley.
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786. Royall v. Peckham.
857. Robins v. Franks.
861. Taylor v. How.
279. Charnell's case.
904. Willymot v. Watton.
2 Cro. 43. Gerrard v. Holland.
114. Minors v. Leeford.
157. Piers v. Gore.
154. Showell v. Hayman.
214. Frank v. Alfop.
253. Gyer v. Omstead.
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315. Holland v. Stoner.
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3 Cro. 42. Spencer v. Med-
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52. Powell v. Plunkett:
140. Lewknor v. Cruchley
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572. Brian v. Wikes:
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150. Ralph v. Davie.
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213. Edwards v. Fallowes.
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 59. Nevil v. Mott.
 46. Pearson v. Dawson.
 24. Drake v. Whitacer.
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 1 Brownl. 10. S. C.
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 1 Roll's Rep. 286. White v.
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 2 Part 91. Brett v. Trevilian.
 165. Mayott v. Gibbons.
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 380. Ayrye v. Higgins.
 S. C. reported in W.
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 440. Smith v. Shortred.
 3 Leon. 231. Warner v. Crop-
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 mus case, ibidem.
 4 Leon. 181. Anonymous.
 1 Bulst. 112. Stow v. Holland.
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 2 Bulst. 134. Bayly v. Maynard.
 141. Painton v. Warne.
 145. Steeneman v. Richard-
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 227. Gilpine v. Shrine.
 3 Bulst. 303. Parrett v. Parrett.
 249. Leawknor v. Goodman.
 161. Crofts v. Brown.
 83. Holly v. Hiendez.
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 41. Anonymous.
 102. Crompton v. Philpot.
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 1 Keb. 127. — v. Wood.
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 2 Keb. 440. Hunt v. Merri-
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 130. Parle's case.
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 3 Cro. 153. Benson v. Morley.
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 622. Boston v. Tatam.
 687. Foster v. Browning.
 39. Kellam v. Mansbie.
 1 Brownl. 2. Cowte v. Gilbert.
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 2 Lev. 205. Froud v. Froud.
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 1 Bro. 12. 294.
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 2 Mod. 52. Cooper v. Hawkef-
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 3 Mod. 280. Anonymous.
- With general Felony.
- Popham 150. Serle v. Mander,
 2 Roll's Rep. 141.
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- 1 Keb.

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| <p>1 Keb. 336. Anonymus.
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 2 Keb. 289. Linter v. Butler.
 2 Roll's Rep. 342. Wheeler v. Appleton.
 3 Cro. 276, 7. Smith v. Hodge-
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 572. Bryan v. Wikes.
 1 Vent. 264. Anonymus.
 1 Bulst. 148. ———
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 877. Cox v. Humphrys.
 2 And. 47. ———
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 Yelv. 154. Newlin v. Faffett.
 1 Syd. 413. Gamble v. Dana.
 Stile 392. Anonymus.
 Moor 686. Lord Mordant Bridges.
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 2 Cro. 58. Sir John Hollis v.
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 3 Cro. 236. Mott and his Wife
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 1 Bulst 109. Tabbe v. Matthew.
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 2 Keb. 494. Gamble v. Jenney.
 1 Vent. 18. Anonymus.</p> <p><i>Where an Intent only is charged.</i>
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 1 Cro. 191. Tibbot v. Haynes.
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 3 Bulst. 167. Crofts v. Brown's
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 2 Syd. 76. Langley v. Clarke.</p> <p><i>Words charging the Plaintiff with
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 2 Bulst. 132 Sir George Reynell
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 1 Keb. 273. Metley v. Slaney.
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 1 Syd. 16. Cassabilly v. Britt.
 1 Lev. 112. Mills v. Monday,
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 1 Vent. 149. Dorrell v. Jay.
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- 1 Cro. 250. Coles v. Haveland.
 1 Vent. 276. Anonymus.
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2 Cro. 150. Edwards v. Ousley,
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3 Cro. 261. Hix v. Hollinshed.
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35. S. C. 1 Syd.
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1 Lev. 255. Shagter and his wife
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*1 Syd. 386. S. C.

3 Lev. 394. Stephens v. Corben.

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1 Syd. 424. Semor v. Moor. 1
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2 Cro. 536. Gainford v. Tuke.

2 Roll. Rep. 104. Kamelford v.
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2 Cro. 504. Blunden v. Eustace.

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3 Cro. 480. Seaman v. Bigg.

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2 Roll. Rep. 72. London v. East-
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this is the same Case as above,
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name of Seaman v. Bigg.

2 Lev. 62. Reeve v. Holgate.

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I have lain with her, and pock-
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- 1 Cro. 234. Brian v. Cockman, 3
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- 2 Cro. 162. The Lady Morison
- v. Cade.
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- 3 Cro. 404. Hawkins v. Bilhead.
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- Popham 36. Davies v. Gardiner.
- Allen 6. Edwards v. French.

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- 3 Cro. 472. Anonymus.
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2 Show. 295. Garrett v. Shelfon, vide Nelson's Lutw. 334. 1 Syd. 424. 425.

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99. Julebath v. Johns.
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2 Cro. 578. Usher v. Betts.
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585. Squire v. Johns, Palmer 151.

3 Cro. 31. Crampe v. Barne.
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1 Bulst. 40. Anonymus.
1 Bulst. 267. Michols v. Carfey. 218.

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1 Mod. 19. Redman v. Pyne.

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3 Mod. 113. Dobson v. Thormistone.

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65. Sir George Moor v. Foster.

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of Prowse v. Wil-
cox.</p> <p>1 Vent. 50. Sir John Kele v.
Ofgood, 1 Mod.
22. 1 Lev. 280.
3 Mod. 139, 163.
1 Syd. 432.</p> <p>1 And 119. Case 168. Broughton
v. Bishop of Coventry
and Litchfield.</p> <p>Latch 49. Button's Case.</p> <p><i>Spoken of Officers in Places of Trust
or Profit.</i></p> <p>1 Cro. 257. Baal v. Beggerly.
358. Wright v. Morehouse.
623. Fish v. Thorogood.</p> | <p>1 Cro. 861. Taylor v. How.</p> <p>2 Cro. 427. Sir William Bron-
ker's Case.</p> <p>80. Stile v. Heath.</p> <p>557. Fleetwood v. Curle.</p> <p>3 Cro. 563. Reginald's Case.</p> <p>480. Seaman v. Bigg.</p> <p>Win. 33, 40. Curle v. Tufkes.</p> <p>Yelv. 62. Sir George More v.
Folter.</p> <p>142. Mile v. Swanfon.</p> <p>Stile 436. Sir Edward Boynton's
Case.</p> <p>339. Strode v. Homes.</p> <p>436. Hentley v. Baynton.</p> <p>2 Roll's Rep. 23. Powell v. Cole.</p> <p>Godb. 157. Lee v. Swann.</p> <p>1 Bulst. 172. Tut v. Kerton.</p> <p>Palmer 67. Palmer v. Large.</p> <p>2 Vent. 266. Walden v. Mitchell.</p> <p>6 Mod. 201. Walmesley v. Ruf-
sell.</p> <p>Poph. 139. Powell's Case.</p> <p style="text-align: center;"><i>Words of a Counsellor.</i></p> <p>1 Cro. 342. Palmer v. Boyer.</p> <p>2 Cro. 267. Rich and Holt's Case.</p> <p>3 Cro. 382. Peard v. Johns.</p> <p>Stile 283. Gibbs v. Price's Case.</p> <p>Popham 207. Carie's Case.</p> <p>Goldsb. 126. } Palmer v. Boyer.</p> <p>Owen 17. }</p> <p>Popham 139. Powell's Case.</p> <p>Noy 98. Preston's Case.</p> <p>1 And. 269. Anonymus.</p> <p style="text-align: center;"><i>Of an Attorney.</i></p> <p>Allen 13. Hilton v. Plater.</p> <p>Hetl. 823. Litman v. West.</p> <p>139. 143. Starkey v. Tay-
lor.</p> <p>167. Alestion v. Moore.</p> <p>169. Gee v. Egan.</p> <p style="text-align: right;">1 Cro.</p> |
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on Actions on the Case.

1 Cro. 589. Martin v. Burlings.

602. Stanley v. Boswell.

914. King v. Shore.

3 Cro. 192. Taylor v. Starkey.

229. Anonymus.

261. Mead v. Perkins.

459. Webb v. Nichols.

515. Anonymus.

40. Lowe v. Plater.

Moore 61. Anonymus.

180. Anonymus.

695. Giddy v. Heale.

855. Yardley v. Ellis.

867. Cox's Case.

Litch 220. Trowbridge v. Hard.

Stile 183. Smith v. Andrews.

3 Salk. 128. Diverse Anonymus Cases.

1 Syd. 326. Baker v. Morfue.

Velv. 32. Shire v. King.

Godb. 214. Anonymus.

1 Brownl. 16. Smailes v. Moore

Palmer 441. Daubury v. Martin

2 Vent. 28. King v. Lake.

1 Mod. 272. Jones v. Powell.

Hob. 8, 9. Yardley v. Ellill.

Ley 70. Roberts v. Lord.

1 Bulstr. 13. Tirlot v. Morris.

*Words of general Slander relating
only to a good Name.*

Moor 10. Anonymus.

1 Cro. 11. Browne v. Dauks.

384. Jenkinson v. Mayne.

Allen 35. Mark v. Cubit, Stile
49. S. C.

1 Keb. 525. Henacre and Betts
v. ———

1 Roll's Rep. 420. Root and Mel-
ling.

Parmer 298. Vaughan v. Scandish.

Stile 221. Winter v. Barnard.

1 Lev. 140. Coleman & Ux. v.
Harcourt.

*Charging the Plaintiff with Whore-
dom.*

Stile 328. Brian v. Twite.

394. Hicks v. Joyce.

424. Stevens v. Ask.

455. Price v. Carr.

460. Williams v. Probe.

*2 Syd. 7. Marston v. Dennis. P *271.

21. Anonymus.

34. Colwood v. Chandler.

Comb. 391. Byron v. Elmes.

Salk. 694. Anonymus.

3 Mod. 120. Baldwin v. Flower.

1 Roll. Rep. 420. Roote v. Mel-
ling.

2 Cro. 462. Sir William Read &
Ux. v. ——— A.

2 Syd. 5. Margaret Coming's Case.

With keeping a Bawdy-house.

1 Bulst. 138. Simpson v. Brooke.

Stile 322. Garland v. Yarrow.

2 Lev. 233. Nowton & Ux. v.
Masters.

Ray 115. Ward v. Marsh.

2 Syd. 15, 34. Hobson v. Black-
well.

March 212. Chambers & Ux. v.
Riley.

3 Keb. 472. Anonymus.

748. Thatcher v. Moys.

Calling the Plaintiff a Bastard.

2 Cro. 413. Vaughan v. Ellis.

642. Elbrow v. Allen.

2 Roll's 248. Palmer 299.

Godb. 327, 421. Anonymus.

3 Cro. 46. Humphrys v. Stan-
field.

W. Jones. 358.

Words

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Words spoken in a Foreign Language.

Hob. } 126. { Gibbs v. Jenkins
 } 195. {

Of a Member of Parliament.

Lut. 1293. Howe v. Perry.

Of a Doctor of Physick.

Godb. 44. Cawdry v. Tetley's
 Cafe.
1 Jon. 366. Doctor Sibthorpe's
 Cafe.

Of a Witness.

Lut. 1292. Stable v. Sayle.

Words spoken of a Juryman.

Moor 876. Anonymus.

Of Slander by Writing.

Moor 141. Broughton's Cafe.
Moor 705. Wood v. Buckley, 1
 Cro. 230. S. C. 297. S. C.
2 Vent. 28. King v. Sir Edward
 Lake
1 Keb. 255, 269, 308, 326, 459.
 Shepherd v. Wakeman.

Words spoken of a Clergyman.

Stile 44. Anonymus.
 363. Drake v. Drake.
2 Keb. 400. Humorist v. Payne.
Allen 63. Dod v. Robinfon.

Of a Justice of Peace.

For sending a warrant in order to
have him arrested, wherein he
recited, that the plaintiff had
been accused before him of fe-
lony whereas he never was.
Windham v. Sir Edward Cleer,
Leon. 187.

Dominus Rex v. Darby, Mod. 3.
139.

Hardr. 501. Pugh v. Owen.
Moor 409. Lord Delaware v.
 Pawlett.

Cro. Eliz. 536. Stafford v. Poole.
 883. Chicheley v. Bar-
 ker.

Comb. 46, 65, 66.

Words charging a Person with a Rape, or with an Intent to Ravish.

1 Cro. 589. Redferne v. Tod.
2 Syd. 76. Langley v. Clarke.
2 Cro. 666 Ridges v. Milles.

Charging the Plaintiff with Piracy.

1 Cro. 62. Morgan v. Kiffe.
Palmer 278. Bennett's Cafe.
Latch 47. Adam's Cafe.

Charging the Plaintiff with Incontinency.

Stile 370. Shererocroft v. Weekes.
Salk. 693. Aubery v. Barton.
2 Syd. 7. Marston v. Dennis.

Words concerning a Title to Lands.

Hetley 31. Andrews v. Bird.

1 Cro.

on Actions on the Case.

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| <p>1 Cro. 419. Marvin v. Maynard.</p> <p>*2 Cro. 163. Earl of Northumberland v. Byrt.</p> <p>213.</p> <p>Yelv. 88. Gresham v. Grinsley.</p> <p>Owen 32.</p> <p>2 Cro. 397. Smead v. Bradley.</p> <p>422. Nelson v. Staffe.</p> <p>484. Tasburgh v. Day.</p> <p>642. Elborow v. Allen.</p> <p>1 Roll's Abr. 88.</p> <p>Danv. Abr. 164.</p> <p>Stile 414. Anonymus.</p> <p>1 Cro. 196, 197. Gerard v. Dickenson.</p> <p>1 Syd. 79, 82.</p> <p>1 Keb. 309.</p> <p>3 Keb. 141.</p> | <p>3 Leon. 177. Williams v. Linford.</p> <p>2 Leon. 111. The same case. P *272.</p> <p>1 Roll's Rep. 409.</p> <p>Moor 172.</p> <p>Moor 144. Mildmay v. Standish.</p> <p>1 Cro. 34. S. C.</p> <p>Moor 187. Johnson v. Smith.</p> <p>2 Roll's Rep. 44. Egerton v. Whittington</p> <p>Moor 411. Penniman v. Rawbanks.</p> <p>1 Cro. 427. } banks.</p> <p>2 Bulstr. 90.</p> |
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Words of a Physician.

- 2 Cro. 270. Cawdry v. Highley.
- 1 Roll's Abr. 54. pl. 10, 11, 12.

Secondly, What Words have been adjudged not actionable.

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| <p><i>Charging the Plaintiff with Treason, or Want of Allegiance.</i></p> <p>1 Cro. Eliz. 878. Fountain v. Rogers.</p> <p>214. Peak v. Pollard.</p> <p>268. Fowler v. Ashton.</p> <p>Godb. 147. Kingston v. Hill's Case.</p> <p>2 Brownl. 166. Ireland v. Smith.</p> <p>2 Syd. 132. Glanvil v. Gully.</p> <p>Cro. Eliz. 275. Berisford v. Prefs.</p> | <p>Palmer 283.</p> <p>1 Cro. Eliz. 503. Elinor Blisset v. Johnson.</p> <p>620. Poe v. Mondford.</p> <p>Godb. Mich. 11 Jac. 239.</p> <p>Palmer 66. Gibbon v. Maggot.</p> <p>Yelv. 153. Weblin v. Mayor.</p> <p>March 109.</p> <p>Owen 33. Winter v. Barnam.</p> <p>4 Leon. 54. Christian v. Adams.</p> <p>Godb. 181. Carle's Case.</p> <p>2 Cro. 331. Barnes v. Ball.</p> <p>635. Harvey v. Chamberlain.</p> |
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With Clipping or Coining.

- Godb. 167. Ward v. Pool's Case.
375. Mill's Case.
391. Symn's Case.

With Murder.

- 2 Cro. Jac. 635. Harvey v. Chamberlain.

With Theft or Robbery.

- Cro. Jac. 214. Frank v. Alfop.
302. Anne Long v. King.
530. Sparham v. Pye.
65. Robins v. Hildredon.
536. Betts v. Trevanian.
687. Foster

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| <p>Cro. Jac. 687. Foster v. Brown-
ing.
204. Powell v. Hut-
chins.
Cro. Eliz. 308. Ball v. Roane, for
want of an averment.
353. Lyne v. Blackhouse.
486. Hall v. Henesly.
672. Anonymus.
780. Griffith's Case.
563. Anonymus.
889. Brown v. St. John.
Godb. 241. Colt and Gilbert's
Cafe.
Hutton 2. Steward v. Bishop.
8. Gibbs v. Davie.
72. Potter v. Brown.
1 Brownl. 2. Cowte v. Gilbert.
2. Scarlet v. Stibbs.
Palmer 66. Gibbon v. Maggott.
29. Bradshaw v. Walker.
358. Strong v. White.
Hob. 77. Coote v. Gilbert's Cafe.
33. Cleark v. Gilbert.
Hob. 177. How v. Bishop.
Yelv. 4. Dawson.
90. Heake v. Moulton.
Syd. 35. Lizard v. Clare.
Winch 3. Goddard 4. Gilbert,
S. C. Winch 10.
P * 273. * 1 Keb. 902. Mason v. Elliot.
Owen 56. Anonymus.
1 Vent. 213. Anonymus.
2 Roll's Rep. 73. Guilford's Cafe.
381. Ayre v. Higgins.
2 Brownl. 280. Flemming v.
Jales, Ayre's Cafe.
Stile 46. Person v. Dawson.
Moor 396. Castleman v. Hobs.
401. Barler's Cafe.
407. Brown v. Brinckley.
409. Brooke's Cafe.
2 Cro. 65. Robins v. Hildredon.
166. Loe v. Saunders.
1 Cro. 279. Charnett's Cafe.
Stile 298. Bishop v. Fitzher-
bert.</p> | <p style="text-align: center;"><i>With Felony or Burglary.</i></p> <p>1 Cro. Eliz. 279. Bayly v. Chu-
rington,
Smith's Cafe
889. Cox v. Hum-
phrey,
Brown v. St. John.
250. Stoner v. Audley.
470. Hall v. Mabbs.
834. Levett v. Hawthorne.
2 Cro. 90. Brook v. Sir Henry
Montague.
Godb. 202. Trin. 10 Jac.
339. Wheeler v. Appleton.
Hutton 38. Mason v. Thompson.
113. Ram v. Lamley.
1 Brownl. 18. Gowland v. Mason.
Hob. 305. Poland v. Mason,
306. S. C.
2 Keb. 401. Gaudy v. Smith.
1 Keb. 345. Crawford v. Dawson.
Stile 298. Bishop v. Fitzherbert.
Latch 175. Robert King's Cafe.
Poph. 210. King v. Merrick.
Noy 124. Bayly v. Child.
Yelv. 21. Barham v. Netherfet.</p> <p style="text-align: center;"><i>Charging the Plaintiff with con-
cealing or partaking of Felony.</i></p> <p>4 Leon. 24. Bluet v. Cooks.
Allen 57. Creswell & Ux. v.
Ventres & Ux.</p> <p style="text-align: center;"><i>With Forgery.</i></p> <p>1 Cro. Eliz. 166. Venard v.
Wotton.
1 Cro. 853. Perkinson v. Bowman.
99. Eugurst v. Browne.
554. Goodale v. Castle.
Hob. 45. Harvey v. Duckin.
327. Powell v. Wind.
Winch Trin. 22 Jac. 90.
1 Roll.</p> |
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on Actions on the Case.

1 Roll. 431. Aier v. Frost.

With Perjury.

1 Cro. Eliz. 297. Leveemore v. Martin.

371. Weaver v. Carden

394. Anonymus.

609. Anonymus.

788. Wyson v. Fenton.

905. Gore v. Moorton.

168. Kinnerley v. Cooper.

2 Leon. S. C.

2 Cro. Jac. 120. Sill v. Heath.

432. Weston v. Dobinet.

462. Sir William Reed &

Ux. v. A——

Hutton 34. Adavis v. Fleming.

44. King v. Bowen, Winch

2 S. C.

127. Davis's Case.

1 Brownl. 13. Adams v. Fleming.

1 Keb. 124. Simon v. Judd.

2 Keb. 548. Kirtle v. Osborn.

1 Syd. 48. Danell's Case.

220. Ball v. May.

Noy 36. Brown v. Mitchell.

March 20. Molton v. Clapham.

1 Roll's Rep. 287. Aphorpe v. Cockerell.

With Deceit.

1 Cro. Eliz. 171. Ryle's Case.

95. Gorge's Case.

403. Brook v. Watfon.

848. Brown v. Street.

843. Robinson v. Mellor.

2 Cro. 239. Hutton v. Bech.

424. Loyd v. Pearse.

2 Cro. 282. Collis v. Malin.

563. Reginald's Case.

Hutton 13. 26 Eliz.

14. George v. Whitlock.

Walcot v. Hind.

Hutton 34. Bayshaw v. Walker.

Hob. 76. Bray v. Hayne.

219. Drury v. Fitch.

Stile 422. Thomkins v. Clark.

2 Bullstr. 138. Killick v. Barns.

2 Roll's Rep. 72. London v. Eastgate.

Raymond 69. Smedley v. Heap.

Syd. 48. Welden v. Johnson.

299. Emerson v. Fairfax.

Jon. 308. Major Tiverton.

1 Lev. 250. Smedley v. Heath.

Owen 47. Trin. 30 Eliz.

Godb. 40. Hill. 28 Eliz.

1 Brownl. 16. York v. Cecil.

*13. Bradshaw v. Walker.

Popham 184. Barker v. Ringrose.

P*274.

For Words of Witchcraft.

2 Cro. 531. Hawkes v. Ange.

3 Cro. 320. Broxhome & Ux. v. Dager & Ux.

202. George & Ux. v. Harvey.

Hutton 132. Soufer v. Burton.

1 Brownl. 14. Hinch v. Heald.

2 Brownl. 276. Payne v. Mutton.

Stile 5. Nulls v. Cheney.

11. Hellena.

47. Turner & Ux.

3 Bullstr. 74. Lowes v. J. S.

All. 37. Yates v. Lindall.

Palmer 297. Anne Knight's Case.

Cro. Jac. 531. Oliver & Ux. v. Stephens.

Noy 22. S. P. Cro. Jac. 639. S.

P. Godb. 341.

S. P. Bullstr. 74. S. C. 1 Roll's Rep. 255. S. C.

Cro. Jac. 399. S. C. Cro. Jac. 150. S. C.

2 Keb. 548. Seemor v. Moor.

Syd. 424. S. C.

Words of a Merchant.

Moor 409. Carter's Case.

1 Cro.

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| <p>1 Cro. Eliz. 424. Charter v. Hunter.
 541. Vanspike v. Cleyson.
 403. Brook v. Watfon.
 2 Keb. 549. Drake v. Hill. Syd.
 424. S. C.
 2 Bulstr. 216. Crook v. Avery.
 Owen 56. Trin. Eliz. 37.
 Godb. 252. Crook v. Averin's Cafe.
 Popham 148. Godfrey v. Owen.
 Hardr. 8. Wake v. Chapman & Ux.</p> | <p>1 Cro. 374. Brawne v. Michael.
 786. Royall v. Peckham.
 834. Lovet v. Hawthorn.
 297. Butler v. Paynter.
 308. Perepoint's Cafe.
 2 Cro. 484. Tasburgh v. Day.
 Palmer 67. Parker v. Large.
 1 Keb. 307. Bill v. Neal.
 Hard. 501. Pugh v. Owen.
 1 Vent. 258. Anonymus.</p> |
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With the Slander of Bastardy.

Words of a Trade that have been adjudged not actionable.

- 3 Cro. 417. Needler v. Symnoll & Ux.
2 Keb. 568. Redman v. Pill.
3 Keb. 242. Collins v. Mathews.
W. Jones 444. Fenn v. Dixe.
5 Mod. 398. Savage v. Robury.
Hardr. 8. Wake v. Chapman & Ux.
2 Roll. 136. Clarke's Cafe.
Latch 114. Hill's Cafe.

Words spoken of Officers in Places of Trust or Profit.

- 1 Cro. 848. Brown v. Street.
854. Greeve v. Copshill.
192. Sir William Waldegrave v. Agas.
Godb. 284. Sir William Bronker's Cafe.
Winch 123. Sir Robert Hitchin v. Brooke.
Yelv. 72. Stile v. Heap.
P * 275. 1 Vent. 275. Thatcher.

Words against a Justice of Peace, that have been adjudged not actionable.

- 1 Cro. Eliz. 306. 433. Sir Christopher Hillard v. Constable.

- Cro. Car. 432. Slater v. Browne.
577. Hexill v. Oyden.
2 Roll's Rep. 24. Randall v. Bell.
Jones 356. Coloabyn & Ux. v. Vinor.
Poph. 140. Bernard v. Beal.
Comber. 391. Byron v. Elms.

With Whoredom.

- 1 Cro. 582. Pollard & Ux. v. Armshaw.
2 Cro. 473. Barmund v. ———
Salk. 696. Graves v. Blanchatt.
Comber. 28, 29. Tuckey v. Flower.
Stile 323. Green v. How.
299. Freeman v. Childerels.
Skinner 86. Anonymus.
1 Keb. 119. Whitaker's Cafe.
222. Toomes v. ———
1 Syd. 396. Barnes v. Prudlin, 2 Keb. 451.
Stile 352. Wall & Ux. v. Bye.
387. Dekin v. Turner.

**Charging the Plaintiff with the Disease of the Pox.*

- Cro. Eliz. 214. Austin v. White.
Cro. Jac. 499. Hunt v. Jones.
414. Califord and Joan his wife v. Knight.
Godb. 278.

Moor

on Actions on the Case.

Moor 573. James v. Rudledge.
Allen 30, 31. Dutton v. Eaton.

With Petty Larceny.

1 Roll's Rep. 286. White v. Brough.
Owen 56. Trin. 37 Eliz.
Hutton 14. Charter v. Hunter.

With being Guilty of a Rape.

Godsb. 287. Bridges v. Mill's
Case; this is the same Case reported in 2 Cro. 686. by the name of Ridges v. Mills.

With Bigamy.

1 Cro. 94. Nicholson v. Line.
Allen 87. Eeles v. Smith.

Words spoken of a Tradesman.

3 Cro. 417. Needler v. Symnell & Ux.
Comber 161. Rice v. Pidgeon.
T. Jones 156. Fox v. Lapthorne.
Raymond 169. Smedley v. Heap.
Hob. 140. Thornton v. Jebson.

Words comparing a Man to another guilty of a Crime.

1 Cro. 31. Smith's Case.

Charging the Plaintiff by Words that were not Certain.

3 Cro. 283. Stirly v. Hill.
Hutton 18. Bland's Case.
Vol. I.

Of a Clergyman.

Cro. Eliz. 502. Parrat v. Carpenter.
94. Nicholson v. Lyne,
Raym. 395. Walfal v. Mary Allen.
Stile 49. Anonymus.

Words charging a Person with being a Barwd, or keeping a Barwdy-house.

1 Cro. 643 Anonymus.
3 Cro. 393. Dymmock v. Fawcett.
2 Keb. 589. Gowell & Ux. v. Birkett.
1 Syd. 241. Ward v. March.

Words concerning a Title to Lands.

2 Cro. 337. Smead v. Bradley, S. P. 1 Roll's Rep. 244. by the name of Swead v. Bradley.
3 Cro. 140. Lawe v. Harwood.
3 Keb. 141. Goulding v. Herring.
153. Manning v. Avery.
Stile 177. Cane v. Goulding.
Ray. 12. Rawlins v. Hill.
1 Roll's Rep. 409. Lovet v. Weller.
Yelv. 88. Sir Thomas Gresham v. Grinley.

Of an Attorney.

3 Cro. 510. Jefferyes v. Payhem.
1 Ventris 98. Jones v. Powell.
T. Jones 23. Payn v. Verdon.
1 Brownl. 6. Yardley v. Ellill.
9. Harvey v. Bucking.
2 Brownl.

Readings and Observations

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| <p>2 Brownl. 253. ——— v. Trotman.
 3 Keb. 136. Ravenhill v Mole.</p> | <p>Hob. 191. Gibbs v. Jenkins
 Stile 265. Rofs v. Lawrence.
 Hetley 175. Goffe v. Browne.</p> |
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P *276. Words uncertain as to any *Crime* at all.

With *Sacrilege*.

- 1 Cro. 62. Donne's case.
 854. Greeve v. Copshill.
 348. Nicholls v. Badger.
 1 Brownl. 13. Bradshaw v. Walker.

- 1 Lev. 250. 1 Syd. 376. Gandy v. Smith.

With *Barrettry*.

- Raymond 75. Harvey v. Martin.
 2 Lev. 214. Cockaine v. Hopkins.

- 1 Cro. 171. Prond v. Hawes.

- Stile 49. Mark v. Cubit.
 127. Stent v. ———

With aiding or assisting in *Theft* or *Robbery*.

- Palmer 10. Tevilian v. Bettie.
 21. Godfrey v. Owen.
 2 Bulst. 206. Murrey v. ———
 3 Keb. 34. Watts v. Grimes.
 Noy 64. Thimblethorpe's case.

- 3 Bulst. 167. Crofts v. Brown.
 3 Bulst. 249. Lewknor v. Godnam.
 Yelv. 64. Sir. John Hollis v. ———

Words in a strange *Tongue*.

- 1 Cro. 865. Price v. Jenkins.

Secondly, *Of the Declaration*.

1. To say in the declaration, that the defendant spoke certain false and scandalous words the *tenor* of which is in the following words, is not good, for it is no express allegation that he spoke the same words, and something might be omitted in the *quorum Tenor*, tho' it is usual in pleading a deed or record to plead it so; and that is, because the deed or record may be viewed to see the agreement or disagreement between it and the plea. Cro. Eliz. 857. *Garford and his Wife* against *Clarke*.

2. The same point is adjudged in 3 Mod. 71. in the case of *fir John Newton and others* against *Stubbs*. 2 Show. 456. S. C.

3. In alledging the words to be spoken in the declaration, it has been held not to be sufficient to say that the defendant spoke these false scandalous words following, (*to wit*) *Mr. Price, you do my Lord Burleigh wrong, that you do not apprehend Jeremy Johnson, (meaning the plaintiff) for a felon and seize his goods, for he, meaning the plaintiff) hath stolen a sheep from Wright of Kirsby, (meaning John Wright) for here is no certainty in the declaration, that they were spoken of the plaintiff, and the judgment was arrested.* Cro. Jac: 126.

on Actions on the Case.

4. Where words are alledged to be spoken in the *presence* of diverse people, it shall be deemed as well as if it had been in *presencia & auditu*. 1 Cro. 487. *Hall v. Hennessy*.

5. To alledge, that the defendant spoke such words, or such like words, or words to that purpose, is not certain enough. 645. *Hall v. Cranfield*.

6. It is necessary to set forth, that the words were spoken in *English*. Moor 182. *Anonymus*.

7. Where the plaintiff declared, that the brother of the defendant had spoken these words of the plaintiff, *viz. Thou thief, thou goat whelp, thou hast stolen a piece of silver from my master* Hocken, and the defendant said as follows, *That which my brother spoke is true, I will justify it, and spend a hundred pounds in proof thereof*; the court held, that this was not a sufficient manner of declaring, but it ought to have been specially averred, that the defendant had notice of the words spoken by his brother. 2 Brownl. 100. *Anonymus*.

8. Where the declaration had set forth a *colloquium* of his person, and then set forth, that the defendant spoke these words of him, and his trade, *viz. That he is a cheating knave*, it was held good after a verdict. 1 Vent. 115. *Terry v. Hooper*.

9. If the declaration has a sufficient description that the words were spoken of the plaintiff, and tho' there should be some matter repugnant, which contradicts their having been spoken in such a manner, yet that repugnant matter is to be rejected; as where the declaration set forth, that there was a discourse between E. the plaintiff's wife, and E. C. the defendant's wife concerning the plaintiff, upon which the defendant E. C. said to the said E. C. of the plaintiff, *Thy husband, &c.* now it is inconsistent that E. C. should speak to herself words of the plaintiff; therefore the surname of *Eliz.* set forth in the declaration shall be* rejected, and they shall be intended to have been spoken to E. the wife of the plaintiff. P *277.
Nicholls v. Brampton. 1 Roll's Abr. 82. pl. 15.

10. Where the declaration was held ill for a slander of *perjury*, not sufficiently alledging therein, that the party before whom the oath was taken had a sufficient authority. Cro. Eliz. 169. *Kimerfly v. Cooper*.

11. Where the plaintiff declared, that he had used the trade of buying and selling cattle for a long time, and had several times bought upon credit, and the defendant said the plaintiff *was a bankrupt*; The declaration was held ill, because he did not shew in the declaration at that time he was of that trade. 3 Cro. 282. *Collis v. Malin*. 3 Cro. 273. 2 Cro. 222. *Yelw. 25*.

12. Where a declaration is bad and uncertain, it may be made good by the defendant's plea; as where the plaintiff sets forth, that the defendant said *the plaintiff was forsworn*, but had not alledged

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ed that he was *forsworn* in any court, and the defendant justifies, shewing the oath that the plaintiff had taken in the *open sessions*, and that it was false; by reason whereof, &c. here the plea had made good the incertainty of the declaration, which else would have been incertain and ill. 3 *Cro.* 228. *Drake v. Corderoy.*

13. Where the plaintiff declared, that the defendant spoke these words of him, (*to wit*) *Thou, &c.* this was held to be a good declaration, for being spoke to him, they are spoken of him. *Kelham v. Mansby, Cro. Jac.* 39.

14. Where an action is brought for words in an inferior court, by the Speaking of which the plaintiff hath received a particular damage; that particular damage must be alledged to have been received within the *jurisdiction* of such inferior court, otherwise the declaration is ill. *Littleboy v. Wright, Ray.* 63. But in 3 *Cro.* 570. in the case of *Ireland v. Blackwell*, where these words were spoken of a taylor, *viz.* *That he had cheated in his trade*; and this was upon a writ of error on a judgment in *Bath*, where the words were alledged to be spoken at *Bath*, within the jurisdiction of that court, and that by speaking of these words the plaintiff lost several customers in the county of *Wilts*; and an exception was taken, that it being within a particular jurisdiction, the jury have no authority to inquire of matters out of the jurisdiction; the court held that this being only an allegation in respect of damages, for the increase of which the jury might inquire of it, in any place whatsoever, it was well enough; and the judgment was affirmed. The same case is likewise reported in *W. Jones* 450.

15. And to maintain this exception, the case of *Ive v. Stone* was cited in 1 *Roll's Abr.* 545. letter *L. pl.* 3. where an action upon the case was brought in *Windsor Court*, upon a promise, that in consideration the plaintiff undertook to draw with four horses 1500 tiles, from a messuage in *Hedley*, in the county of *Bucks*, to the top of *Hedley Hill*, the defendant promised to pay 5*l.* and in as much as that inferior court could not proceed to try this matter, because it appears, that *Hedley Hill*, and the *house*, was in the county of *Bucks*, of which the jury within the jurisdiction of the court of *Windsor* could not inquire; the judgment was reversed. The same point is likewise adjudged in 3 *Cro.* 571.

16. In an action for damages by loss of marriage, alledging that he intended, and was endeavouring to marry such a woman, is not certain enough. 2 *Bull's* 276, 277. *Sell v. Facy.*

17. Yet where a *communication* was alledged of a marriage with *M. H.* and that he was like to have married her, but for the speaking of such words she refused, was held good. *Allen* 6. *Edwards v. French.*

*18. So in declaring for a slander of a title to lands, it has been held not sufficient to say, that the plaintiff had a purpose to settle lands upon his son, and also to make certain leases; but if he had said, that

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that having a communication about settling of land, and making leases, and that he purposed so to do; the Lord Chief Justice *Coke* said it would have been good. *Smead v. Badley*, 3 *Bullr.* 75, 6.

19. So where the declaration was, that the plaintiff was like to have sold his lands, and was hindered by words spoken by the defendant, that was not held sufficient; for he ought to have alledged, that there was a communication had before the words spoken, touching the sale of those lands, and that by speaking thereof he was hindered. *Cane v. Golding*, *Stile* 169, 177.

20. And that a communication ought to set forth in this manner, *viz.* That the plaintiff had a communication with *A. B.* concerning the plaintiff's selling such land to the said *A. B.* and that upon such communication, the said *A. B.* was willing, and intended to have bought them, and then set forth the slander. *Tasbrough v. Day*, 2 *Cro.* 484, 485.

Of the Colloquium.

1. It is said in *Raymond* 86. in the case of *Terry v. Hooper and his wife*, by *Jones*, that in ancient times, it was the constant course in declarations, to lay a *colloquium* of the plaintiff; and it had been a great doubt, whether the declaration was good without it, until that point was settled in the case of *Smith v. Ward*, in *Cra. Jac.* 673. and there it was resolved, that the words being alledged to be spoken of the plaintiff, it supplies the place of a *colloquium*.

2. But if a man calls a tradesman a *cozener*, or a *cheater*, these words will not bear an action, without there be a *colloquium* of his trade laid in the declaration. *Hard.* 8. *Wake v. Chapman and his wife*, 5 *Mod.* 398. *Savage v. Robury*, 2 *Salk.* 694. 1 *Vent.* 117, 263. *Ray* 62, 169. *Jones* 156. 2 *Saund.* 307. 1 *Lev.* 280. 2 *Ven.* 62.

3. Where the words spoken of an attorney were, *that he could not read a declaration*, it ought to have been averred that he could read one, but in as much as it was, that the defendant *falso dixit*, &c. it was held well enough after a verdict. 1 *Ven.* 297. *Powell v. Jones*.

4. Where words are spoken of a man, of *stealing the goods of another*, not mentioning the name of the person, or what the goods were, yet it has been held, that there is no need to lay a *colloquium*; as where the words were, *he stole the colonel's cupboard-cloth*; so 'tis said in that case, the same had been good if the defendant had said, *that the plaintiff stole my Lord's horses, or the parson's sheep*. Anonymous, 3 *Mod.* 280.

5. And where the words were, *J. P. is a knave, and a busy knave, for searching after me, and other honest men of my sort, and I will make him give satisfaction for plundering me*; spoken of a justice of

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of peace, and no *colloquium* laid of his being a justice; by two judges against two, the opinion was, that no *colloquium* was necessary, and so the plaintiff had judgment. 3 *Mod.* 163. the case of *Prowse and Wilcox*.

P *279. 6. These words were spoken of the plaintiff, *Britteridge is a perjured old knave, and that is proved by a stake parting the land of A. and B.* These words were held not to be actionable, because it did not appear that he was perjured by a judicial oath, and the stake could not prove him perjured; but if there had been a proper *colloquium* set forth, as the truth was, the action would have lain, (to wit) that they had a discourse about a controversy, whether the stake stood upon the land of the one, or the other; and the plaintiff as a witness deposed, &c. and as the defendant pretended, *perjured himself in his evidence.* 4 *Co.* 19. *Britteridge's case.* 3 *Cro.* 177. *Shalmer v. Foster and his wife.* 236. *Mot and his wife v. Butler.*

7. Where a communication is alledged to have been at *H.* and that upon such communication the defendant said such words, this is not a right way of declaring, because, though the communication was alledged to be at *H.* and that upon that communication the words were spoken, it ought to have been alledged, that the defendant then and there spoke the words; for the communication might be at *H.* and the words might have been spoken at another place. *Palmer* 385. *Taylor v. Tully*; nor is it good to say the words were spoken at *D.* and *S. Dal.* 106. 2 *Roll's Rep.* 373.

8. Where a *colloquium* was alledged to be of the plaintiff, by the defendant, and the declaration set forth, that the defendant said, *thou,* &c. but did not set forth that the words were spoken, either to or of him, yet it was held well enough. *Bishop v. Fitzherbert,* 1 *Roll's Abr. fol.* 85. *pl.* 8. *Cro. Jac.* 126.

9. Where a *colloquium* is alledged of the plaintiff, and the words are supposed to be spoken to a third person, 'tis necessary to shew to whom they were spoken; as where the words are, *your father,* (meaning the plaintiff) *hath struck and killed Nicholas Russel,* this *innuendo* is not sufficient to ascertain, that the words were spoken of the plaintiff, without shewing to whom the words were spoken, and that person was the plaintiff's son. 1 *Roll's Abr. fol.* 85. *pl.* 9.

10. These words were spoken to the father of the plaintiff, *thy son hath murdered my child,* the judgment was arrested, because it did not appear, that there was a communication of the plaintiff, nor was it averred that he was the only son of the father, to whom the words were spoken. 2 *Cro.* 635. *Harvey v. Chamberlain.*

Of the Innuendo.

1. The nature of an *innuendo* is to explain words that are somewhat doubtful, but yet that matter thus explained by the *innuendo*, must

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must be matter sufficient to maintain the action; but if the words before the *innuendo* do not sound in slander, no words made use of under the *innuendo* shall make the action maintainable; for it is not the nature of the *innuendo* to beget an action. *Yelv. 21. Barham v. Netherfall.*

2. Where the plaintiff had declared, that he was produced as a witness, and the defendant said, *that he was disproved before the justices of assize by the oath of Mr. Kinnerley, (innuendo) that he was disproved in his oath*; it was adjudged that the action would not lie, for that the *innuendo* could not supply such an intendment. *Moore 407. pl. 547.*

3. The *innuendo* made use of in the declaration in this action, is no more than as the word *prædict*, and cannot make the person or scandal certain, which was uncertain before. *4 Co. 17. b.*

4. Yet in the case of *Wilner v. Hold*, where the words were, *thou art a rogue and a rascal, and hast killed thy wife, (meaning one Elizabeth, late wife of the plaintiff)* it was adjudged that it sufficiently appeared the said *Elizabeth* was dead, but then it is to be understood it was after a verdict. *Cro. Car. 489.*

5. The matter of the action shall not be enlarged by the *innuendo*. *Hob. 2, 3. Thomas v. Axworth.*

6. Where the words were, *thou hast poisoned Smith, (quendam Samuelem Smith innuendo) aditunc defunct*, this, without a communication alledged, or any averment, was held not good; for it doth not appear that he poisoned him willingly, nor that *Smith* was dead at the time of the words *spoken, and the *innuendo* for that purpose is P *280.
no sufficient averment. *Hob. 6. Miles v. Jacob. Hob. 8. 1 Roll's Abr. 77. pl. 7.*

7. Where words were spoken of the general receiver of the court of wards in this manner; Mr. Deceiver (*innuendo* the plaintiff) *had deceived and cozened the king, and dealt falsely with him, and I have him in question for it, and I doubt not but to prove it e'er long.* It was alledged, that it doth not appear by the words spoken, that they were spoken of the plaintiff; for Mr. Deceiver had no propriety to that purpose, and then the *innuendo* will not make it certain, to which it was answered; that if a man, looking upon three persons, should say, *one of these three murdered a man*, no *innuendo* will help this incertainty, no more in the person, than in the matter of the scandal. But here, in as much as it is said, that at the time of the words, the defendant had a discourse of the plaintiff, here the word *Deceiver*, though in propriety it doth not import receiver, yet the allusion and ironical resemblance of the name doth very well bear the application of the *innuendo*; and if such a slight evasion should be admitted, it would be a common practice to slander safely. *Hob. 268. Fleetwood v. Curle.*

8. But where the declaration set forth, that the defendant spoke these words; *he, (meaning the plaintiff) shewed me first a bill of forty*

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forty pounds without a seal, (meaning the said bill) by the said E. as aforesaid sealed and delivered: And afterwards he shewed me the same bill, with a seal, and he, (meaning the plaintiff) hath forged the seal of the same writing, (meaning the seal of the said bill, by the said E. as aforesaid sealed and delivered). Judgment was given for the defendant, for the innuendo was of no use; for since the words were only a writing, which is utterly uncertain, an innuendo will not change the matter of words, for that is by the innuendo to make the words otherwise than they were. *Hob. 45. 1 Brownl. 9.*

9. So where words were, *thy father is a thief*, (innuendo the plaintiff) this innuendo will not make the declaration good, which was ill for want of a proper allegation, that the words were spoken to the son of the plaintiff, nor in his presence. *3 Cro. 92. Phelps v. Lane.*

Other Cases concerning the Innuendo.

2 Show. 285. Jackson v. Hall.	1 Roll's Abr. 73. pl. 18. Yelv.
3 Buft. 83. Helly and Henderson's case.	21. Noy 155.
3 Cro. 442. Slocomb's case.	Cro. Eliz. 834.
3 Cro. 420. Spencer v. Medburne and his wife.	Cro. Jac. 215, 343. Cro. Car.
W Jones 376. Anonymus.	489. 1 Roll's Abr. 77. pl. 6.
1 Cro. 496. Johnes v. Davers.	1 Roll's Abr. 85. pl. 7. Hob.
Brownlow 7.	45. Cro. Eliz. 609.
Cro. Eliz. 297, 428, 609. 4	Cro. Car. 236, 512. 1 Jones
Co. 20. Moor. 396. pl. 516.	409. 2 Brownl. 123.
Owen 57.	Moor 401. 4 Co. 17. b. 3
	Lev. 166.
	Yelv. 21. Barham v. Netherfale.

Of the Averment.

1. Where an averment was held necessary in the declaration, to shew that the defendant was the plaintiff's servant at that time, *Moor 63.* that there might be a sufficient *designatio personæ*.

2. Where a declaration was held ill, because it set forth, that the defendant spoke scandalous words, *tenor quor' sequitur*, and then mentions the words, and then says *& confimilia*. *Hall v. Cranfield.*

3. In charging the defendant with speaking words of a merchant, it is not good to say in the declaration, that for many years last past, *P *281.* the plaintiff hath been a merchant, but it is proper to say at the time the words are laid to be spoken. *Cro. Eliz. 794. Dotter v. Ford.*

4. See where it was held sufficient to say, that he is of such a trade, and for many years past hath been, without saying last past. *Tutkild v. Milton, Yelv. 158.*

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5. Where a declaration was held insufficient for want of shewing, that the person to whom the words were spoken was the plaintiff's father. *Gouldsb.* 187.

6. *Maktise* being omitted in a declaration was held sufficient, because the words appeared to be so. *Mercer v. Sparkes, Owen* 57.

7. Where a declaration for slandering of a title, was held ill, because it was not shewn that the plaintiff had sustained any damage. *Smead v. Badley, 2 Cro.* 397.

8. Where the words were, *he is a maintainer of thieves, and keepeth none but thieves in his house, and I will prove it*; this declaration was held ill, and the judgment reversed upon a writ of error, because it was not averred that he knew them to be thieves. *1 Cro.* 746. *Ball v. Bridges.*

9. So where the words were, *thou dost serve false warrants, and deceivedst the people*; these words were judged not actionable, for want of an averment that he knew them to be *false warrants*. *4 Co.* 15. *a. b.* cited in the case of *Waldgrave v. Agas, 1 Cro.* 192.

10. Words alledged to have been spoken in *præsentia diversorum ligeorum* hath been held good, without saying they were spoken in *præsentia & auditu*. *1 Cro.* 487. *Hall v. Henniesley.*

11. An action was brought by husband and wife, for words spoken of the wife, and they concluded to the damage of both of them. And the court held it well; but justice *Wythers* was of the contrary opinion; for he said, if an innkeeper's wife be called a *cheat*, and the house loses its trade, the husband hath an injury by the words spoken of his wife, but the declaration must not conclude *ad dampnum ipsorum, &c.* *3 Mod.* 120. *Baldwin v. Flower.*

12. Where the words were, *thou and Waterman did kill thy master's cook*, (meaning one *Tarnson*, late servant of *Francis Dingley, Esq;*) and *thou wast never tried for it, and I will bring thee to thy trial for it*. In this case it was resolved, that it need not be averred that the plaintiff had a *master*, and that *Francis Dingley* was his master; for it being here alledged, that the cook was servant to *Francis Dingley*; it follows that *Francis Dingley* was his master. *Bridg.* 60. *Cooper v. Smith.*

13. In *Winch* 70, 89. in the case of *Potter and Browne* it is said, that where the words are, *he is as arrant a thief as any in England*, the plaintiff need not aver, that there are thieves in *England*, for the difference is there said to be when the words relate to a particular place, and when to the whole kingdom, and so when the slander is tied to one kind of felony.

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Where Averments have been held necessary in Declarations, and where not.

First, Where Declarations have been held not good without Averments.

Hob. 6. Jacob v. Miles, 1 Roll's Abr. fol. 77. pl. 6. Of the death of S.

Noy 63. Webb v. Poor, Cro. Eliz. 569. 1 Roll's Abr. fol. 77. pl. 7. Of the death of the defendant's aunt.

Stile 65, 66. ——— v. Long. Of the death of the defendant's child.

1 Roll's Abr. 78. fol. 9. Cro. Eliz. 889. Of the plaintiff's having sheets at the time of speaking the words.

P *283. **2 Bulst. 141. Cro. Eliz. 783. Heath v. Poole.* The same point. *Lit. 166.* Of there being a little boy then in the house.

Cro. Eliz. 308. Ball v. Roane. Of there being a robbery committed within forty miles of *Wellingborough*.

Hob. 219. Bland's Case. That the plaintiff was not indicted.

Cro. Jac. 687. Hester v. Browning. That there was a thief in *England* at that time.

Hutton 70. Potter v. Browne. To the same purpose.

1 Rolle's Abr. fol. 79. L. G. pl. 2. That the parties supposed to be suborned were examined in a cause.

1 Roll's Abr. fol. 79. L. G. pl. 3. That issue was joined, and that there was a trial.

1 Roll's Abr. fol. 80. pl. 4. That the plaintiff was master to the husband of the person to whom they were spoken.

1 Roll's Abr. fol. 80. pl. 8. That the plaintiff's mother had no more sons.

1 Roll's Abr. 80. pl. 10. That the plaintiff was sufficiently described to be the person spoken of.

Cro. Car. 420. Spencer v. Medburne. That the plaintiff was landlord to the defendant.

1 Roll's Abr. fol. 84, pl. 2. Delamere v. Hoskins. Of the identity of the person of the plaintiff.

1 Roll's Abr. fol. 84. pl. 3. Potter v. Loveday. The like point.

Pl. 4. Johnson v. Dier. The like point.

Cro. Eliz. 889. Brown v. St. John. Of the certainty whose house was supposed by the words to have been broken open.

Noy 116. Wittam's Case. That a man was perjured.

Yelv. 9. Heake v. Moulton. That there are acts for which a man is to be hanged, to shew, that it is a slander to say a man deserves to be hanged.

Cro. Car. 40. Love v. Plater. That there are dishonest persons, by which it may appear, that the superlative expression of the defendant relates to a comparison of a thing existing.

1 Brownl.

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1 *Brownl.* 13. *Bland v. Edmonds.* That such a person was indicted at such a place, because the defendant would have the plaintiff indicted as that person was.

3 *Cro.* 443. *Slocomb's Case.* That the plaintiff was brother to the person to whom the words were spoken.

177. *Shalmer v. Foster and his wife.* Of the identity of the person supposed to be killed.

Cro. Ja. 331. *Ratcliffe v. Michael.* Of a fact before committed to which the slander charged had relation.

Secondly, Where declarations have been held good without particular *Averments.*

1 *Roll's Abr.* 77. pl. 1. *Popham* 128. *Cro. Cac.* 423. *Bridg.* 68. Of the identity of the person.

Noy 55. *Elwin v. Moor.* That the defendant had a son.

Lit. Rep. 166. That the person robbed had such goods.

1 *Syd.* 327. *Baker v. Morfue.* That C. had any bull.

1 *Roll's Abr. fol.* 77. pl. 4. *Stile* 66. That J. S. had any cook.

1 *Roll's Abr. fol.* 77. pl. 5. 2 *Bulst.* 42. 1 *Vent.* 117. 1 *Syd.* 53. Of the death of J. S.

2 *Bulst.* 141, 142. How much the defendant was then worth.

1 *Roll's Abr. fol.* 78. pl. 10. *Willet v. Sands* 1. Of the death of R. H.

Noy 116.

Cro. Eliz. 214. *Lacy v. Reynolds.* Of there being any thief in *Warwick Gaol.*

**Stile* 221. *Winter v. Barnard.* That a bastard child was drowned. P *283.

1 *Cro. Ja.* 443. *Browne v. Lane.* That the plaintiff was the defendant's master.

1 *Roll's Abr. fol.* 80. L. H. pl. 3. That the plaintiff was landlord to J. S.

1 *Roll's Abr. fol.* 80. pl. 5. *Ellis v. Knights.* Of the identity of the person of the plaintiff.

1 *Roll's Abr. fol.* 80. pl. 6. *Cro. Jac.* 107. That the plaintiff had no more brothers.

1 *Roll's Abr. fol.* 82. pl. 17. *Foxcroft v. Lacy.* That the plaintiff was present when the words were spoken.

1 *Roll's Abr. fol.* 85. pl. 5. *Allen* 7. That the plaintiff was a captain, or known by that name.

1 *Roll's Abr. fol.* 65. pl. 2. *Hole v. —* That the defendant was under-sheriff at that time, the matter being a scandal to him without considering him in his office.

1 *Roll's Abr.* 77. pl. 4. Without any averment that the plaintiff had such a cook supposed to be killed.

Cro. Eliz. 824. *Talbot v. Case.* *Cro. Jac.* 331. *Barons v. Ball.* To the same purpose.

1 *Ventris*

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1 *Ventris* 117. *Philips v. Kingston*. Of the death of the person supposed to be murdered.

6 *Rep.* 126. 2 *Cro.* 687. *Yekw.* 54. *Winch* 87. 1 *Syd.* 53. To the same purpose.

2 *Bulst.* 42. *Billing v. Knight*, 1 *Syd.* 227. *Ball v. May*. That the plaintiff was indicted.

Of the Plea, Replication, &c. in this Action.

1. Where an action is brought for words spoken by the wife; though the husband and wife must be put in the plea, for the sake of conformity; yet the tenor of the plea must be, that the wife is not guilty, otherwise it will be wrong. *Mordon v. Leedall*, 1 *Brownl.* 4. 6. *Smailes v. Belt and his wife*.

2. Where words were spoken of the plaintiff by the defendant, who was married to the plaintiff before the suit, that matter was held a good plea in bar. *Raym.* 395. *Walsall v. Allen*.

3. Suspicion of a man's having stolen another's plate, is not a foundation for speaking these slanderous words; *Mr. Plunkett did steal my plate out of my chamber*. 3 *Cro.* 52. *Powell v. Plunkett*.

4. Where the words were, *thou hast played the thief with me, and hast stolen my cloth, and half a yard of velvet*, and the defendant justified that the plaintiff was his taylor, and that on such a day, &c. he delivered him a yard and half of velvet, to make him a pair of hose, and he made them too straight; by reason whereof he spoke these words, *thou hast stolen part of the velvet which I delivered you*, and traverses the speaking in any other manner; this plea was ill, because he said nothing of the words *thou hast stolen my cloth*; and if the plea and traverse do not confess the words of slander, the traverse is ill. 1 *Cro.* 239. *Johns v. Gittins*.

5. To an action for these words, *thou wast forsworn in the leet, within such a manor*, the defendant pleads, that the plaintiff such a day was sworn with others before the steward, to present, &c. and they presented, that such a ditch was not scowred *ad nocumenium*, &c. which was false; and on a demurrer it was held an ill plea, because it did not shew that the ditch was within the jurisdiction of the leet; and if not, it was no perjury. *Cro. Eliz.* 492. *Wylde v. Cockman*.

P *284. *6. Where words were actionable at first, at the time of speaking them, there the particular damage accruing afterwards, does not give the cause of action, and the statute of limitations is a good bar. But where the words at the time of speaking them are not actionable, but by reason of speaking them, the party loses his preferment, or hath some particular damage, there the statute of limitations was held to be no bar. *Ray.* 61. *Saunders v. Edwards*, 1 *Syd.* 95. S. C.

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7. Where a justification was held good to an action for the slander of perjury, setting forth process upon an attachment in London, wherein the plaintiff had sworn, that 10l. was due to him from the defendant, which was found to the contrary by the jury. *Moor* 79. pl. 210. *Lucas v. Cotton*.

8. Where the declaration was, that the defendant said of the plaintiff, *he was perjured*, to which the defendant pleaded, that the plaintiff had brought an action in the King's Bench against the defendant, for that the defendant said, *the plaintiff was perjured, and had cozened John Sowgate*, and that the defendant had pleaded to all besides these words, *thou art perjured*, not guilty; and to these words, *thou art perjured*, justified, that the plaintiff was perjured in making an affidavit in the star-chamber; and upon this issue was joined, and it was found for the defendant; but it was not pleaded that any judgment was given upon it; yet it was held a good plea, but in *trespass*, it was said it ought to have been averred, that it is the same trespass, and there ought to be judgment, which the defendant ought to rely on as an *Estoppel*. 2 *Brownl.* 123. *Jacob v. Sowgate*.

9. An action was brought for these words, *he is a rascally alderman, a fictitious alderman, a lampooner*, and avers, that a lampooner, is well understood to be a libeller. The defendant pleads a recovery in a former action brought by the plaintiff for the same, and laid in the same manner, only no interpretation is given for the word *lampooner*; in which action the plaintiff was barred; and it was held, that the plaintiff being once barred in an action for the same words, he shall not recover by this with an addition of a new interpretation of the word *lampooner*. *Gardner v. Helvis*, 3 *Lev.* 248.

10. Where a justification and traverse were held ill because the action was transitory. 1 *Cro.* 153. *Bellingham v. Minors*.

11. Where a matter was adjudged to be traversable. *Kinnerfley v. Cooper*, *Cro. Eliz.* 168.

12. Where a plea and traverse therein were adjudged ill, not confessing any words of slander. *Cro. Eliz.* 239.

13. Where a justification contains matter of fact, there a general replication is good, that the defendant did it without any such cause; but where it contains matter of record, which is not bare inducement to the subject matter, there it is ill without a traverse. *Moor v. Savage*, 2 *Leon.* 81.

14. Where a replication was held ill, for that it did not answer to the whole substance of the plea. 3 *Leon.* 269.

15. Where the cause of the justification relates not to all the words, such justification is ill. 2 *Cro.* 676. *Hilsden v. Mercer*.

16. Where an action was brought against a counsellor at law, for that he said, *the plaintiff was arraigned and convicted of felony*, the defendant pleads, that upon an attain against the jury he was their counsel, and as such did utter the words in the declaration, and

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and so justifies, and it was held a good justification. *Brook v. Sir Henry Mountague*, 2 Cro. 90.

P *285. 17. A justification must not answer as to part, and be silent as to another part; as where the words were, *thou art a false forsworn man, thou wert forsworn at the leet at R. and didst procure others to be forsworn*, and the defendant justified, for that the plaintiff being one of the jury presented that for a nuisance which was none. This was held to be no good justification either in matter or form; not in matter, because though a man presents a thing that is not true in a leet, yet he is not forsworn, because he may do it upon information, as jurors in the sessions or assizes; nor in form, because he does not answer to the procurement of others to be forsworn. *Moor 537. pl. 701. Wild v. Chapman.*

18. The plaintiff declares for words spoken in *London*, the defendant pleads, he spoke the words in *Essex*, and that at such a place, he had made an *accord* with the plaintiff of all trespasses, actions, &c. in every place, except at *London*, and had given him satisfaction for them, and *traverses*, that he spoke the words in *London*. The plaintiff replies, that he spoke the words in *London*, *prout*, &c. and *traverses*, that he made such an *accord*, and the *traverse* taken in the replication was held to be good, for the place where the words were spoken is not material; but when the defendant by his plea hath made the place material, there the plaintiff has his election to maintain his declaration, or may by general words maintain his declaration, and *traverse* that which is falsely alleged in the defendant's plea. *Inglebath v. Johns*, 1 Cro. 99.

Fourthly, Of the Trial and Damages.

1. From whence the *venue* is to be awarded where there is a local justification. *Ford v. Brooke*. Cro. Eliz. 261.

2. Where it was adjudged to be a mis-trial, the *venue* not being pursuant to the justification. *Goldsb. 28. Bowyer's Case*, Cro. Eliz. 468.

3. Where the action was laid in *Suffolk*, and the addition of the defendant was *A. C. de C. in Com. Essex*, and the words were alleged to be spoken at C. in the county aforesaid, which was in the county of *Essex*, and adjudged a mis-trial.

4. Where an action upon the case is brought for calling a man perjured, it must be observed, that when the plaintiff was indicted for the perjury before the action brought, the action shall not be tried before the indictment be determined; but if the action upon the case was brought before the indictment, and afterwards he is indicted, the action upon the case may be tried first. 1 Syd. 69. *Anonymus.*

5. Where

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5. Where the court would not grant a new trial in an action of *scandalum magnatum*, though the damages were exceeding great, viz. 4000l. 2 Mod. 150. Lord Townsend v. Doctor Hughes.

6. It is said in 2 Salk. 644. in an *Anonymous* case, Pasch. 8 W. 3. B. R. that the court never, or very rarely, grants new trials in actions for words.

7. And where the court would not do it, when the damages were 800l. for these words, *thou art a beggarly rascal, and go pay thy debts*; spoke by the sheriff of London of a wealthy citizen of London. T. Jones 200. Boulsworth v. Pilkington.

8. Where an action is brought for two sets of words, one whereof is actionable, and the other not, and entire damages are given, the judgment shall be arrested as to the whole. Graves and Blanchett, 6 Mod. 148. the same point, 2 Cro. 424. Loyd and Pearse's Case.

9. But this must be understood, where the words are laid to be spoken at different times; for where words are in part actionable, and in part not, and the words are spoken at one and the same time, and entire damages are given, there the jury shall be intended to have given damages for those that were actionable.

Jaxon v. Turner, 3 Cro. 237, 328. 1 Cro. 282. 3 Cro. 236. 237.

Jaxon v. Tanner, Penso v. Gooday, 3 Cro. 327, 328. 3 Cro. 788.

1 Roll 576. Moor 142. 10 Co. 131. 1 Roll 239. 1 Cro. 282.

*10. Where words are spoken by husband and wife, for words P *286.
spoken by both, and the action is confessed, the damages must be severally assessed. Moore v. Moore and his wife. Cro. Eliz. 296.

11. Where an action was brought for calling the plaintiff thief, and for procuring him to be indicted and imprisoned for felony until he was acquitted. It was held, that in as much as this was not only for words, but likewise an action upon the case in the nature of a conspiracy, it was out of the statute of 21 Jac. 1. of no more costs than damages, if the damages are assessed under 40s. 3 Cro. 263. Topfall v. Edwards, 307. Blizzard v. Barnes.

12. In the case of Larve v. Harwood, an action for slandering the plaintiff's title to lands was held clearly to be out of the statute of 21 Jac. 3 Cro. 140, 1.

Of the Judgment and Execution.

1. Where the plaintiff had brought an action in the King's Bench for words, and recovered, and brought another action in the Common Pleas; and the judgment in that action upon a writ of error was affirmed, the court would not award execution upon the first judgment. Moor 418. Matthew v. Wood.

2. Where the plaintiff declares for words that are actionable, and the defendant justifies the speaking of other words, and traverses the

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the words in the declaration ; and upon the trial, the jury find other words spoken that are not actionable, the plaintiff can have no judgment. *Dyer* 118. *b. pl.* 79.

3. In the case of *Boulsworth v. Pilkington, T. Jones* 200. an execution *fiery facias* was taken out, returnable at a common return, directed to the sheriff of Surry, and the sheriff on the return-day, made a return of *nulla bona* ; upon which a *testatum* issued, rested the very return day of the first *fiery facias*, and it was held to be good, and a difference was taken between the process, which commands the defendant's appearance ; for there the *quarto die post* is to appear in, before which no new process can issue ; but it is otherwise in an execution. *Boulsworth v. Pilkington, T. Jones* 200.

Actions upon the Case on an Assumpsit.

1. This species of actions upon the case, like all other actions upon the case, are *actiones injuriarum & contra pacem* ; and though a debt for the payment, of which a promise is made, either express, or by implication of law may be recovered by it ; yet my Lord *Vaughan* tells us, that it is not the debt certain that can be recovered by this action, but only damages arising from the breach of the promise, which cannot be known, until a jury ascertain what the damage is. Therefore a man could never wage his law for a demand uncertain ; for he could not make oath of paying that which he knew not what it was, as consisting in damages. And though the jury give in damages regularly, the money promised to be paid, yet that changeth not the reason of the law, nor the form ; for still it is recovered by way of damages, and not as a debt recovered, which shews, (*says he*) that this action is much inferior, and more ignoble, than an action of debt, which by the register is the action of property. *Vaughan* 101.

2. So that the foundation of this action arises upon the breach of promise made to a man, upon a consideration which is superintended to be the ground and foundation of such promise, which then becomes a contract, wherein the party who makes the promise must have *quid pro quo*, or otherwise the contract is nude and void.

P * 287. * Having said thus much in general of the action, the cases in the books are herein after inserted under the following general heads.

First, *Of the Action itself.*

Secondly, *By and against whom to be brought.*

Thirdly, *Of the Declaration.*

Fourthly, *Of the Plea, Replication, Rejoinder, Issue, Traverse, &c.*

Fifthly, *Of the Trial, Evidence and Damages.*

Sixthly, *Of the Judgment and Execution.*

And

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And as to the action itself, it will be proper, in order to understand the several circumstances incident to this action, to descend to the following particulars. 1. The consideration. 2. The promise. 3. The breach or discharge of the promise. 4. The several acts of parliament that have been made relating to this particular species of actions upon the case.

First, Of the Consideration.

1. As the consideration in this case, is the ground and foundation, upon which the defendant himself expressly makes, or the law consequently implies a promise, of the breach, for which he is to render satisfaction to the plaintiff in damages; it is proper to be known, that this consideration may arise, and be created two manner of ways; *First*, by some meritorious act to be done by the plaintiff for the benefit of the defendant; or *Secondly* by doing, or permitting somewhat to be done to the plaintiff's prejudice or loss. 10 Co. 102. *Hob.* 4, 5, 216. So that it is not absolutely necessary, that the consideration of a promise import some gain to him, that makes the promise. But it is sufficient, that the party, to whom the promise is made, doth forego some advantage or benefit which he might have taken, as may be seen in the case of *Preston v. Toole*, *Cro. Eliz.* 74. 4 *Leon.* 110. *Webb's Case*.

2. As if one promises another to take up a hogshead of wine out of a cellar, and to lay it into another, no action will lie for not performing this promise, because it was no benefit to the party who made the promise: But if the person who made such a promise, does once enter upon the performance of it, he must do it in such a manner as it ought to be done; because, when I have accepted of a trust; that I had a liberty to refuse, it is but just that I execute it, so as not to prejudice the person who reposed that trust in me; as if by laying down the hogshead in an improvident and careless manner I stave it, an action lies against me for it. *Coggs v. Barnard*, 1 *Salk.* 26.

3. And it was held, that the case of *Pickas and Guile*, reported in *Yelwerton* 128. was not law; where, if *H.* delivers goods to *A.* and in consideration thereof, he promises to redeliver them, it was held that no action would lie for the redelivery of them, and that this resolution had always been grumbled at.

4. And the case of *Heath and Low*, reported in 2 *Cro.* 667. where money was delivered to pay over without delay, it was held, that an action would lie; for when a man takes a trust upon him, he is bound to perform it; and the case of *Riches and Bridges*, in 1 *Cro.* 883. seems entirely to join with the other two, to shake that resolution of *Yelu.* where a man received money to pay another, and

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did not so do, it was held that an action lies, for, in regard he received it, it shall be intended that he had some benefit thereby, (that is to say) that he had better credit, by having it paid into his hands, otherwise he would not have made such a promise.

P *288. *5. Where goods of a third person are taken in execution, and I promise, in case he will restore them, I will pay the debt; that has been held to be a good consideration. *Salk. 28 Love's Case.*

6. So where a man promised another, that if he would accept him for his debtor, for a debt due from A. he would pay the money, that was held a good consideration, not barely as a promise on the part of C. but the judges construed it a mutual promise, and this without an averment that A. was discharged. *Roe v. Haugh, Salk. 29.*

7. And this consideration is either executed or executory; if the consideration be executed, and does not go along with the promise, but is entirely past, and the promise be merely subsequent, it is not a sufficient consideration to ground a promise upon, unless some thing arises between the parties, that is meritorious; as if one, in consideration that I have built him an house, quitted him of a trespass, or such like, promises me to do another thing, or pay me so much money; that has been held not a good consideration, because there appears nothing but the consideration perfectly past, without any thing incident thereto to continue it.

8. As if the lessee hath spent a great deal of money in defence of his title, and afterwards he in reversion, in consideration thereof, promises, that the lessee shall have another lease after the expiration of his term; here in this case it was adjudged, that the consideration was executed before the promise. *Moore v. Williams, Moor 220. Case 357.*

9. So where a man promises for some thing past, as because another hath quitted him of a trespass, or in recompence of a trespass before done, or because he hath let his friend have wares, that he will pay him a sum of money, or do some thing else; this is said to be a consideration perfectly past, and will not support an *assumpsit*. *Flow. 5. 302. 1 Roll's Rep. 413.*

10. So where the plaintiff declared, that in consideration, he had delivered, and given to the defendant twenty sheep, he promised to pay him five pounds at the day of marriage; this was held a consideration past; and the judgment was arrested after a verdict. *Jeremy v. Goochman, Cro. Eliz. 442.*

11. So where the plaintiff declared, that in consideration, that the plaintiff, by the defendant's appointment, had paid a little before 60 l. for the debt of the defendant, he promised to repay it on demand; that consideration was held past, and the judgment stayed. *Barker v. Hallifax, Cro. Eliz. 741.*

12. But where the consideration is past and executed, if somewhat appears from the nature of the consideration that preserves and keeps it subsisting, it will be good; as in the case of *Pearle and Unger,*

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Unger, Cro. Eliz. 94. where the plaintiff was possessed of certain lands for a term of years; and in consideration he had occupied the lands, and paid the rent, the defendant promised to save the plaintiff harmless, and the plaintiff is disturbed by his cattle being distrained, though the occupation and payment of the rent is said to be past, yet as the plaintiff continued in possession, and was still to pay rent, that preserved the consideration, and was held good. A promise on a consideration executed is good, if there was a duty before. 1 *Lev.* 198. *Johnson v. Astell*. Where the plaintiff declared, that such a day the defendant was indebted to him in so much, and in consideration thereof, afterwards, (to wit) such a day the defendant promised to pay, this is not a consideration past, but the continuance of the debt raises a promise, and an action. 1 *Roll's Rep.* 413. *Hodge v. Vavasor*.

13. In some cases, where a consideration is passed and executed, the law has supplied the place of an express promise; as where a man at the request of the defendant, desired T. to credit the defendant with two tons of wine, and the plaintiff gave his bond for it, *and was sued and paid; this was held a good consideration to ground an *assumpsit*. 2 *Cro.* 18. *Boslen v. Thinn*. P *289.

14. So where the plaintiff declared, that in consideration the plaintiff had bestowed labour and pains to reconcile differences between the defendant and J. S. and others, the defendant promised to pay such a sum of money, though it was alledged, that this was a consideration past and executed, and not sufficient to ground a promise upon; yet it was over-ruled, and held a subsisting consideration, because the pains were taken at the request of the defendant. *Stile* 465. *Hardres v. Prewd*.

15. So where it was, that in consideration that the plaintiff, at the defendant's request, by his deed had given to the defendant the first and next avoidance, the defendant on the 22d of August, promised to pay the plaintiff 100 l. this consideration, though past, was held good, it being done at the defendant's request, especially being done to the defendant himself, the consideration shall be construed to continue. *Cro. Eliz.* 715. *Riggs v. Bullingham*.

16. So the law appears to be in *Yelv.* 40, 41. in the case of *Bosden v. Flud*, where the doing a thing for the defendant at his request, shall cause a subsequent promise to be good, and the consideration in construction of law said not to be perfectly past. *Dyer* 272. 1 *Cro.* 282. *Beauchampe v. Meggin*.

17. Where the plaintiff declares, that in consideration he had bought three parcels of land on such a day, the defendant afterwards promised to make him a sufficient assurance; here the consideration was adjudged not to be absolutely past, for the assurance was the substance of the sale. *Cro. Eliz.* 138. *Warcop v. Morfe*.

18. That in consideration the plaintiff would buy all his wares at such a price, the defendant promised he would leave off his trade

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at such a place, held a good consideration. *Broad v. Jollyffe*, 2 Cro. 596.

19. Where the under-sheriff brought an action, setting forth, that the defendant, in consideration of sixpence given the defendant, he promised to pay the plaintiff 60 l. if he would execute an *elegit*; held no good consideration, for he was bound to execute the writ. 2 Cro. 103. *Bridge v. Cage*. *Noy* 111.

20. Where there are two competitors for a place of under-sheriff, and the one promised, that if the other would desist, he would pay the plaintiff 20 l. that was held a good consideration. 2 Cro. 612. *Parker v. Brown*

21. A mere stranger to a meritorious act done to a third person, cannot make a promise applicable to himself; as where the plaintiff declares, in consideration one *Parry* would permit the defendants to sue in his name, they promised to pay the plaintiff a sum due from *Parry*, that was held no good consideration; but where a promise was made to the father, that in consideration he would perform such a cure, the defendant promised to pay the father so much, and the daughter so much; there the nearness of the relation shall carry the benefit of the consideration to the daughter, and she may bring an *assumpsit*. 1 Vent. 6. *Bourne v. Mason and others*, 1 Ven. 318. *Dutton v. Pool*.

22. Where the defendant promised to pay the plaintiff a sum of money, in case the bishop would absolve the defendant from an excommunication, it was held a good consideration. *Curtis and others v. Collingwood*, 1 Vent. 297.

23. *Mich. 6 Car. B. R. Morgan's case* cited in *Hard. 73*. a lessee promised, in consideration the lessor would forbear to distrain his corn unshocked, he would pay his rent that was due; adjudged to be no consideration, because such corn is not distrainable. *Hard. 73*.

Where forbearance of the suit is the consideration, these three following things must be observed:

- P *290. *1. The forbearance must be general, or for a particular time certain, and not for a time uncertain.
2. If it be of a debt, it must be for a debt really due.
3. If the consideration be forbearance of a suit, it must be from a suit in which the defendant is chargeable, or the person from whom the debt is said to be due.

To illustrate which the following cases are in point.

As to the first.

24. In *Moor*, case 1167, where the declaration was, that in consideration the plaintiff would abstain from prosecuting the defendant for a debt, that he would pay it before such a feast; there, in

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as much as it was to forbear, and neither mentions whether it was a total forbearance, or for a time certain, it was held ill; but in the case of *Linghill v. Broughton*, *Moor* 854. 1 *Cro.* 19. *Lutwich v. Hufsey*, 455. *Philips v. Sackford*, where the consideration was for a forbearance for a reasonable time; it was held good, and that the court ought to judge, whether it was a reasonable time or not.

And in the case of *Mature v. West*, 1 *Cro.* 665, where the defendant was indebted to him in such a sum, in consideration the plaintiff would give him a day of payment, the defendant promised to pay, and then the plaintiff alledges he gave him such a day, and the defendant had not paid; this was held good.

Where the declaration set forth, that the defendant was indebted the plaintiff in consideration thereof, and that the plaintiff would not implead the defendant, the defendant promised to deliver the plaintiff 14 quarters of barley, was held good. *Moor* 685.

As to the second.

25. This difference must be taken where the plaintiff promises to forbear the debt, and where 'tis only to forbear a suit; for where the defendant's husband was indebted to the plaintiff, and died possessed of diverse goods which came to the defendant's hands; and the defendant in consideration, that the plaintiff would forbear the debt for a certain time, she promised to pay it, this is a good consideration. 1 *Roll's Abr.* 22. *pl.* 23.

26. In the case of an executor, there has been a great contrariety of opinions both ways concerning this consideration of forbearance, in the case of *Johnson v. Witchcot*; the resolution was that where the executor promised, in consideration of forbearance, there he shall be liable *de bonis propriis*, though he pleaded he had no assets. 1 *Roll's Abr.* 24. *pl.* 33. in 9. *Co.* 94. It was said, that the executor might give it in evidence; but in 1 *Ventris* 121. in the case of *Davis and Wright and others*, it was resolved that it is not material, whether the defendant had assets at the time of the promise or no; but it is reported, that the chief justice said, if it had appeared upon the declaration, that there were no assets, the plaintiff would fail in his action, *but surely none would set out with that in the declaration.* 3 *Leon.* 67. 2 *Lev.* 20. 1 *Ven.* 152. 2 *Lev.* 3.

As to the third.

27. See 1 *Bulstrade* 44, 45. *Smith v. Jones*, where the defendant was husband to an executrix, and the goods of the testator came to his hands; and in consideration the plaintiff would forbear to sue him, he promised to pay a legacy of seven pounds; the court held, that

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that as the defendant could not be sued for his legacy, the promise made by him to pay the same is not good. *Moor* 691. *Rotheram v. Stibbing*.

28. *Note* ; This was at a time when the judges held the law to be, that an executor was not chargeable with the promise of the testator, and executors were not suable for the simple contracts of the testator ; but at length it came to be resolved, that an executor was suable for a debt due by the testator upon a simple contract, because it was a duty certain in the testator ; *Legate v. Pinchion*, 2 *Cro.* 293, 294. but still a difference continued, where it was a promise to do a collateral act, and a collateral promise not being a duty, it was not performable by the executor, but in the case of *Fawcett and Charter*, in 2 *Cro.* 663. It was resolved by the Lord *Hobart*, and all the other judges of the common pleas, and by the barons of the exchequer, that there is no difference, but in either of them the action is maintainable against the executors.

29. So where a woman was executrix, and promised to pay a legacy, and had assets, and died, and the goods came to the hands of the husband, and he supposing himself to be chargeable, promised the legacy upon forbearance ; this was held no good promise in 1 *Bulstr.* 44. in the case of *Smith v. Jones*, but the law is now clearly otherwise, in 2 *Lev.* 3. in the case of *Davis v. Reynier*.

30. Yet though there must be a debt it has been held in the case of *Wollaston v. Webb*, that it need not be set forth in the declaration, how the debt accrued ; for as the day given is the express consideration, that debt is allowed in the actual promise ; but otherwise where the debt itself is the consideration of the promise. *Hob.* 18.

31. If a man be arrested upon a void arrest, and another, in consideration of setting him at liberty, promises to pay the debt, there it is a thing collateral ; but if the arrest comes in question, the action will not lie, but he must avoid it by special pleading ; for the arrest being unlawful, there is no consideration whereon to ground the promise. *Godb.* 360. *Randal v. Horvey*.

32. *Mich.* 1651. *B. Hummers v. Hunton*, action upon the case for a promise ; setting forth, that the defendant's son died indebted to the plaintiff, and the defendant being his mother, (but does not say she was executor or administrator to him, or that she had any effects of her son's in her hands) promised, if the plaintiff would forbear to sue for his debt, that she would pay it. This was adjudged to be no consideration, because she was not liable to any suit ; so that the plaintiff had no prejudice by such forbearance. *Hard.* 73.

33. In consideration, that the plaintiff would endeavour to persuade another to marry her, she would pay the plaintiff 40 l. this was held a good consideration, and the declaration good, without shewing

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shewing what means he made use of. Ray. 400. *Aglionby v. Tower-
son*, reported in 2 *Show.* 95. by the name of *Kirby v. Tower-
son*.

34. But where the consideration was, that the plaintiff should consent, and would not hinder the defendant from marrying such a person, the declaration is ill, if no consent is shewn, and the place where. 2 *Lew.* 227. *Chapman v. Fothergill*,

35. Where the consideration was, that the plaintiff would give her consent to the marriage of the daughter, and heir apparent to her husband, it was held a good consideration: for that the mother hath, by the law of nature, an affection and interest in the daughter; and the confidence that the daughter is supposed to have in her counsel and direction, was construed a means to incline the daughter's mind, either one way or other, and the desire of her consent shews, that the plaintiff conceived it was; and therefore it shall be presumed of great importance to him to have it, and consequently that it was a sufficient consideration. *Grifley v. Lother*, Hob. 10 the same case is reported in 1 *Brownl.* 18. and in *Moor* 857 and note; in the margin of the case in *Hobart*, it was said, *the husband being her father, who legally hath the power over the child, and not the mother, was alive at the time of the promise; but yet her power is also great in nature.*

For considerations touching executors and administrators, see hereafter concerning actions by and against executors and administrators.

*What have been held good Considerations.

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1 *Rolls Abr.* 19. pl. 6. } Relating to a consideration arising from
Raymond 203, 204. } forbearance of a suit, or the time of
 payment of money.

¹ *Roll's Abr.* 19. pl. 7. The delivery of goods to the defendant.

pl. 8. To the delivery of a pawn to the defendant.

pl. 9. The mother's consent to the marriage of her daughter.

Godb. 216. The plaintiff's procuring her master to permit the defendant to have a shop in his house.

Hutton 39. *Moor* 857. *pl.* 1176. 1 *Brownl.* 18. *Hob.* 10. The plaintiff's procuring the consent of the lessor, that the lessee might assign his term.

¹ *Roll's Abr.* 20. pl. 10. The plaintiff's promising that she would permit her son to serve the defendant.

pl. 11. The forbearance to sue, though the plaintiff had but a qualified power of suing the defendant.

pl. 14. Plaintiff's selling goods to B. upon a promise, that if B. does not pay for them, the defendant will.

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1 *Roll's Rep.* 354. 3 *Bulstr.* 162. 1 *Roll's Abr.* fol. 20. pl. 15. 1. Plaintiff's paying money due upon a bond, by plaintiff and defendant, upon a promise, that the defendant would pay a moiety.

1 *Roll's Abr.* fol. 21. pl. 17. The payment of the principal sum due, upon which the plaintiff promised to stay a suit against C. the co-obligee, against whom he had judgment.

fol. 21. pl. 18. 1 *Brownl.* 31. *Hob.* 250. Plaintiff's agreeing not to sue out administration during the minority of the infant.

Moor 685. pl. 946. *Holt v. Tilcock*, 1 *Leon.* 240. *March* 55. But if the wife was entitled to the administration, such promise is not a good consideration.

1 *Roll's Abr.* fol. 21. pl. 19. That the wife of the plaintiff would not hinder the purchase.

fol. 22. pl. 24. That A. would pay 30 l. for the bond of 60 l. entered into by a stranger, the defendant promised to deliver it up. 1 *Leon.* 238. *Cro. Eliz.* 194. *Cro. Car.* 8. *Hutton* 76. 101. 1 *Lev.* 198.

1 *Leon.* 61. *Gill v. Horwood*. That the plaintiff promised the defendant, he would forbear to sue him for a small time, and the case of *Brook and Dowse*, in 1 *Roll's Abr.* fol. 23. pl. 25. reported in *Cro. Car.* 241. by the name of *Cooke v. Dowse*, hath been denied to be law. *Gouldf.* 48. *Cro. Car.* 250. 1 *Bulstr.* 91. 3 *Leon.* 200. 2 *Roll's Rep.* 368. *Cro. Eliz.* 19. 1 *Syd.* 45.

fol. 23. pl. 30. The defendant being in arrear in several sums to the plaintiff, if he could not prove in a short time he had paid it, he would pay it, and the defendant did not prove it in a year.

fol. 24. pl. 31. That B. will pay half the reckoning at a public-house, the defendant an executor would pay 10 l. which was due upon a bond, where B. was a co-obligor with the testator, and a good consideration.

fol. 25. pl. 37. The delivery of an inquisition, where the plaintiff had no title to an *elegit*, and a promise to redeliver.

fol. 26. pl. 38. The accepting a lease at 10 l. a year, and the defendant promised to dress his meat at 2 d. per joint, and find other necessaries for him.

fol. 27. pl. 41. That the sheriff will execute a writ without any fee, the defendant promises to pay him a certain sum.

fol. 28. pl. 44. That the plaintiff will forbear a suit for a reasonable time. *Hutton* 108. *Lit. Rep.* 304. 1 *Syd.* 45. 1 *Bulstr.* 92. *Moor* 853. 1 *Roll's Rep.* 379.

P *293. Fol. 27. pl. 45. That the plaintiff would forbear to sue a stranger, with an averment that he did, and yet does forbear. 1 *Syd.* 45. *Hob.*

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Hob. 219. *Popham* 183. 1 *Leon.* 118. *Godb.* 72. *Cro. Jac.* 683.
Hutt. 46. *Cro. Eliz.* 455.

Fol. 27. *pl.* 46, 47. That the plaintiff will forbear to sue a stranger for a little time, with an averment of a certain time of forbearance. So where a man is under an arrest, and the plaintiff discharges him, upon the defendant's promise to pay, &c.

Fol. 27. *pl.* 50. That *D.* had lead oar delivered to him by *C.* administrator of *B.* who sold it to the plaintiff.

Fol. 28. *pl.* 53. That the obligor will pay the money to deliver up the bond.

1 *Rolls Abr.* 28. *pl.* 54. The payment of a lesser sum for a greater, and a promise to release and acknowledge satisfaction on record. *Moor.* 412. *Cro. Eliz.* 409.

pl. 55. Payment of the consideration of one of the bail, against whom the plaintiff had an execution, and a promise to assign the bond, and discharge him from the execution.

pl. 57. That the plaintiff would forbear to sue the heir upon the bond of his ancestor. 4 *Leon.* 6. 3 *Leon.* 67, 68. 2 *Saund.* 136. 1 *Ven.* 159. 1 *Syd.* 31. 1 *Lev.* 165.

pl. 59. *A.* promises, that if *J. S.* shall win a game at butts of *B.* twenty-one up, that *A.* will pay *B.* 20 l. if not then *B.* promises to pay *A.* 20 l. 2 *Leon.* 154. *Moor* 549.

pl. 60. That the plaintiff will accept of the defendant to be his debtor for another, he being in debt in the same sum to the plaintiff's other debtor. 1 *Vent.* 153. 1 *Ven.* 15. *Stile* 249. *Hard* 73. 1 *Saund.* 210. 1 *Lev.* 262. 1 *Jones* 87. 1 *Lev.* 248. 2 *Ven.* 71.

3 *Leon.* 105. *Brett v. Peggrim*, an award submitted to, and amongst other things, the arbitrators were going to order the delivery up of two bonds, that at the request of *B. A.* permits the delivery of the two bonds to be left out of the award, and *B.* promises to deliver them up.

1 *Leon.* 297. *Tooly v. Preston*. That the plaintiff should deliver the defendant a recognizance, and the defendant promises to return it within six days, or pay 1000 l.

Cro. Eliz. 67. That the plaintiff shall shew the defendant a deed, by which it may appear, that so much rent is due; the defendant promised to pay it, who was an assignee, *Sturlyn v. Albany*; yet it is said, if the money had been due by bond, and there had been a promise to shew the bond, it had not been good — *Cro. Eliz.* 150. *Cro. Car.* 70.

1 *Leon.* 192. *Rockwood v. Rockwood* The father being sick, declares his intention to grant a rent out of his lands to *B.* his younger son; *A.* the eldest, in consideration he would not charge the lands, promised to pay the rent.

1 *Leon.* 220. *Poyne v. Plain*. In consideration that the plaintiff, who had an execution ready to be executed upon the goods of
J. S.

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J. S. would deliver the goods to the defendant, he promised to pay
— although the goods were not liable to the execution.

Cro. Eliz. 883. *Riches v. Bridges.* In consideration that *A.* will deliver twenty quarters of corn to *C.* which *A.* owes *B.* *C.* promises to deliver the same to *B.* at a day to come. *Yelv.* 4. 128. *Con. Yelv.* 50.

Hutt. 63. *Barwry v. Scarlet.* In consideration that *B.* would order his attorney to confess a judgment, *C.* promised that judgment should not be entered.

Cited in 2 *Roll's Rep.* 495. In consideration that the plaintiff would not take out an execution upon a judgment that happened to be erroneous, the defendant promised to pay, &c.

P *294. *1 *Syd.* 89. *Siot v. Stevens.* That the plaintiff would forbear to sue the defendant, being an executor for a legacy. 1 *Roll's Rep.* 27. 1 *Ven.* 40. 1 *Lev.* 272.

Owen 123. *Meres v. Conham.* That the plaintiff had delivered to the defendant a thing pawned to him.

Popham 192. *Anonymus.* That the plaintiff would do and perform all the plaintiff's lawful commands, &c.

48. *Battersey's case.* That the plaintiff would keep a prisoner all night, that the defendant had arrested: defendant promised to save him harmless.

What Considerations have been held insufficient.

1 *Roll's Abr.* 18. *L. U. pl.* 1. A promise by the mother, in consideration of forbearance, to pay the debt of an infant that was not liable.

But this case is reported in *Owen*, that the infant gave a bond, and that the defendant being his executor, promised to pay the money; and this case is cited in *Popham* 178. to be adjudged contrarywise. *Cro. Eliz.* 126.

1 *Roll's Abr.* 18. *L. U. pl.* 2. Forbearance to sue an infant upon a bond, held no consideration; but adjudged to the contrary, in 3 *Leon.* 164. *Edmond's case.* 4 *Leon.* 5. *S. C.* *Godb.* 158.

1 *Roll's Abr.* 19. *L. U. pl.* 3. Where a promise by a feme covert was void, yet an action lay against *D.* who undertook, that the feme covert should perform it.

1 *Roll's Abr.* 19. *pl.* 4. Money paid by an infant, and in consideration thereof, *A.* promises to build him an house; this is no good consideration.

2 *Leon.* 205. *Foley v. Windham,* *Cro. Eliz.* 206. *Hob.* 216. In consideration of forbearance of a suit in chancery, where it was not held good.

1 *Roll's Abr.* fol. 19. *pl.* 12. In consideration of forbearance to sue where the bill was assigned, but the property remained in the assignor.

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Palmer 185. *Potter v. Turnor. Winch* 7. The like point where the debt was due by bond, and the bond assigned.

fol. 21. *pl.* 16. *vide Moor* 468. Where the father gave 90 l. with his daughter, upon a promise of her returning 10 l. back.

1 *Roll's Abr. fol.* 23. *pl.* 27. In consideration, that the plaintiff would surrender up an estate at will, the defendant promised to give him a parsonage. 1 *Brownl.* 6. *Cro. Eliz.* 565. otherwise if there had been a communication about this lease at will.

pl. 29. In consideration that the plaintiff would make such a lease at will to the defendant, as counsel should advise.

Yelv 184. *Smith v. Jones.* In consideration of C.'s forbearing to sue D. who had married B. the wife of A. for a legacy bequeathed by A. that D. promised, &c. *Cro. Jac.* 257. *Owen* 153. 1 *Bulst.* 44.

1 *Roll's Rep.* 215. In consideration that B. to whom goods were pawned, would forbear to sell them for three days, C. promises to pay &c. and he does stay, &c.

Stile 305. In consideration, that the plaintiff would not distrain the corn in shocks, the defendant promised to pay, &c.

Tooley v. Windham, Cro. Eliz. 206. *Dyer* 272. *Hunt v. Baker. Godb.* 33. *Sidenham v. Worlington.* In consideration of forbearance.

Dyer 328. *Mountford v. Catesby.* In consideration of the defendant's quiet enjoyment of lands.

Yelv. 184. *Smith v. Jones.* In consideration of forbearance, where the defendant was not chargeable.

1 *Cro.* 200. *Fetherston v. Hutchinson.* Of letting a prisoner go at large.

*1 *Cro.* 537. *Grimston v. Reyner.* In consideration of the defendant's being indebted upon the arrearages of an account. P *295.

Godb. 13. *Anonymus.* In consideration of the plaintiff's having granted to the defendant a term of years in an estate.

Anonymus. Of forbearance, and does not aver he had given a day.

Moor 710. *Case* 992. *Adams v. Dixon.* In consideration of the plaintiff's having been bail.

Moor 701. *Case* 974. *Bowes v. Powlet.* In consideration of forbearance to sue the debt, being assigned to the king.

1 *Roll's Abr.* 25. *pl.* 36. *Westbee v. Cockaine.* In consideration that B. would pay C. 10 l. for which B. with E.'s husband was bound to C. that E. promised to pay, &c.

Fol. 26. *pl.* 39. The relinquishing a void promise made by A. *pl.* 40. That he shewed the defendant's goods, and in consideration the plaintiff would take them in execution, the plaintiff promised to save him harmless. *Cro. Jac.* 652.

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Fol. 27. pl. 51, 52. In consideration that *A.* delivered money to *B.* to pay to *C.* otherwise if *C.* had given *B.* a day of payment.
Cro. Jac. 667. Palmer 281. Yelv. 164.

3 *Leon. 88. Smith v. Smith.* In consideration that *A.* would commit the education of his children to *B.* and the disposition of his effects, during their minority, *B.* promised to procure lands to be assured to one of the children.

Moor. 539. Ross v. Moor. In consideration that the plaintiff would relinquish his suit. *Cro. Eliz. 561. Cro. Eliz. 869. Con.*

Owen 144. Dogget v. Dowell. In consideration of the plaintiff's lending the defendant money, the defendant promised to lend the plaintiff money, or forfeit 5 l.

Noy 140. Oldfield's case. 1 Brownl. 3. Mose v. Canham.

What other Considerations have been held good and sufficient, and what not.

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| <p>1 Roll's Abr. fol. 22. pl. 22.
1 Roll's Rep. 435.
1 Ven. 211, 212. Evan's case.
Hard. 366. Trever v. Roberts.
4 Leon. 2. Anonymus.
1 Keb. 81, 82.
1 Syd. 323. Chapman v. South-
1 Lev. 204. } wicke.
2 Lev. 33. Woolnough and his
 wife v. Weldon.
Hutton 39. Hall v. Woolen.
1 Cro. 138. Warcop v. Morfe.
2 Bulstr. 73. Jones v. Clarke.
1 Cro. 906. Garnous v. Hodges.
1 Cro. 660. Keble v. Brown.
Cro. Eliz. 747. Glascock v. Duffield.
Godbolt 358. Randall v. Harvey.
Stile 416. Pinchard v. Fowke.
Stile 248. Rosyer v. Langdale.
395. Boyle v. Scarborough.
Moor, Case 974. Bowes v. Powlet.
1 Cro. 282. Beauchamp v. Neggin.
1 Roll's Rep. 413. Hodge v.
 Vavafor.
P * 296. Cro. Eliz. 125. Ireland v Higgins.
 700. Sherwood v. Woodward.
Cro. Eliz. 821. Chadwick v Sprire.
 883. Riches v. Bridges.
1 Roll's Abr. fol. 35. pl. 35.</p> | <p>1 Roll's Abr. fol. 22. pl. 21.
1 Cro. 149. Boyle v. Bagshaw.
Yelv. 128. Pickas v. Guile.
164. Brand v. Lisle.
Cro. Eliz. 218. Burde v. Plain.
Cro. Eliz. 880. Lady Shandos v.
 Simpson.
Yelv. 11. Gurnos v. Hodges.
Cro. Eliz. 466. Clifton v. Gibbon.
470. Knight v. Rushworth.
Hob. 105. Lampleigh v. Braith-
 waite.
1 Cro. 178. Drabridgecourt v.
 Smallbrook.
1 Cro. 654. Stanton v. Suliard.
Cro. Eliz. 849. Rippon v. Norton.
Yelv. 19. Jennings v. Hartley.
Hard. 73, 74. Reynolds v. Prof-
 fer.
9 Co. ——— Bane's Case.
Godb. 159. Case 220. Anonymus.
1 Roll's Rep. 27.
Godb. 358. Randall v. Harvey.
2 Brownl. 279. Rivet v. Down.
Popham 177. Goodwin v. Wil-
 loughby.
Latch 141. S. C.
Palmer 441. S. C.
Hard. 73. S. C.</p> |
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| <p>1 Lev. 222. 1 Syd. 337. Downes v. Beck.
 Raym. 32. Traverse v. Meres.
 1 Syd. 242. Quick v. Copleston.
 Yelv. 164. Brand v. Lisley.
 2 Bulst. 41. Sir John Pooley v. Lady Gilberd.
 Winch 7 8. Potter v. Turnor.
 3 Bulst. 206 Lurgin v. Broughton.
 1 Leon. Case 80, 61, 155.
 1 Roll's Rep. 215. Caper v. Dickenson.
 2 Cro. 206, 207.
 2 Bulst. 278. Chapman v. —
 Gouldsb. 437. Shutford v. Brough Barnaby.
 Owen 29. Smith' Cafe.
 1 Bulst. 44. Yelv. 184. Smith v. Jones.
 Hutton 47. 3 Bulst. 206. Lingen v. Broughton.
 2 Brownl 279. Rivet v. Down.
 Yelv. 25. King v. Hobbs.
 1 Roll's Rep. 413. Hodge v. Vavafor.
 1 Roll's Rep. 433. Beresford v. Goodrouse.
 27. Lane v. Mallory.</p> | <p>Hob. 4, 5.
 1 Roll's Rep. 193. Saunders v. Easterbie.
 Hard. 71, 2, 3. Reynolds v. Proffer.
 Yelv. 10. Goring v. Goring.
 19. Jennings v. Hartley.
 1 Keb. 439. Stonehouse v. Bodvill.
 Yelv. 56. Pickard v. Cortells.
 Cro Eliz. 755. Brett v. J. S. and his wife.
 551. Barrow v. Gray.
 Godb. 202, 290. Hatch v. Capell.
 2 Cro. 273. Bond v. Paine.
 Cro. Eliz. 644.
 Yelv. 49, 50. Game & Ux. v. Harvy.
 Moor, Cafe 505. Sheffield v. Prife & Ux.
 3 Bulst. 222. Hodge v. Vavafor.
 Godb. 31. Sydenham v. Worlington.
 1 Roll. Abr. fol. 22. Carter 233.
 1 Leon. 147. 1 Syd. 18. Stile 295.
 1 Keb. 866.
 Cro. Eliz. 774. Collins v. Mills & Ux.</p> |
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Secondly, *Of the Promise.*

In treating of the promise, it is to be considered; 1. That the matter promised must be good and lawful; 2. Possible; 3. Certain, and of some signification, and not frivolous and nugatory.

1. For if one promises to do a thing that is unlawful, such promise is void; and therefore if one promises to do that which is in itself maintenance, that promise is void. *Hob 72. Dyer 356.*

2. If a sheriff for ten pounds promises, that a prisoner shall escape, this promise is not good. *10 Co. 76, 102. Dyer. 356. Cro. Eliz. 200. Fetherston v. Hutchinson.*

3. A promise to a sheriff to save him harmless, on his making such a one a special bailiff at his request, is good. *Cro. Eliz. 178. Dabridgecourt v. Smallbrooke.*

But a promise made to the plaintiff, that if he would suffer the defendant to go at large, he should appear at the return of the process, or pay

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pay ten pounds, is good, and not against the statute of 23 H. 6. but if the promise had been made to the sheriff, it would not have been good. *Cro. Eliz* 190. *Milward v. Clerke*, because the plaintiff might dispense with the defendant's appearance.

4. A promise made to the under-sheriff, then in possession of goods by an *elegit*, that in consideration the plaintiff, at the defendant's request, would sue out another writ of *elegit*, and deliver it to the defendant, and authorize a third person to receive the goods, he promised to cause the goods to be found by an inquisition, and to deliver the goods to the person so authorized; this promise engages him against the duty of his office, and though a part of the promise be not unlawful, yet it depending on that part which was unlawful, the whole is vicious. *T. Jones* 24. *Morris v. Chapman*.

P *297. 5. If one, who is a minister of justice, promises to do a thing that is unlawful in his office, or another promises to save him harmless, in so doing, such promises are void; as where *A.* had levied a plaint in the *Stepney* court against *B.* and a precept to attach the goods of *B.* was directed to *C.* the bailiff. And whereas he had attached corn in shocks, and delivered them to *A.* to redeliver them at the next court, *A.* promised to save him harmless, no action lies against *A.* for not saving *C.* harmless, because the attaching the corn in shocks was unlawful; but if it had not been so, yet *C.* ought, as bailiff, to have kept them, and not to have delivered them over to the plaintiff. *Mead v. Bygott*, 1 *Cro.* 230.

6. But though the consideration be unlawful, yet in this case, a promise to save harmless from an imprisonment done at the defendant's request was held to be good; as where *A.* brought *B.* to a common inn, of which *C.* was the host, and affirms to *C.* that he had arrested *B.* by virtue of a commission of rebellion; and in consideration that *C.* would keep *B.* as a prisoner, by the space of one night, *A.* assumes, and promises to save *C.* harmless, if *B.* recovers against *C.* in an action of false imprisonment, *C.* may have an action against *A.* for though the keeping *B.* was unlawful, it did not appear to *C.* to be so. *Hutt.* 55. *Fletcher v. Harcourt*, *Winch* 48. Note; this was upon *non-assumpsit* pleaded; Q. whether it would have been good, if it had appeared upon the pleadings to be an unlawful arrest.

7. But if it appears, that the act which is to be done is unlawful, upon the face of it; as if *A.* in consideration that *B.* will beat *C.* promises to save *B.* harmless, that would be a void consideration, and consequently the promise built upon such consideration would be void. *Hutton* 56. *Winch* 49.

8. So in the case of *Allen v. Rescous*, in 2 *Lev.* 174. this promise was adjudged void, where the defendant in consideration of 20 s. promised to pay the plaintiff 40 s. if he did not beat *J. S.* out of such a close.

9. But where the case was, that *A.* having a *feri facias*, for 60 l. against the goods of *B.* and delivered the writ to *C.* to whom it was directed

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directed, and *A.* told *C.* that such woollen cloths were the wares of *B.* and liable to the execution; and in consideration that *C.* would levy the money upon those goods, *A.* would enter into a bond to indemnify *C.* upon request; and *B.* having sued *C.* and recovered in trespass upon an action brought by *C.* against *A.* upon his promise, it was held to be a good promise. 2 *Cro.* 652. *Arundel v. Gardiner.*

10. If *A.* be sued on a bond, and I become bail for him, and judgment and execution be had against me, and the plaintiff promises me that if I will pay him, he will assign me the bond and debt therein, and makes me a letter of attorney to sue for it in my own name; this is said not to be a good promise, and against law, being as it is said champerty. *Dixon's Case, Mich. 39 Eliz. B. R. Cro. Eliz. 538.*

11. Yet see the case where *A.* obtained a judgment against *B.* in the marshal's court, and afterwards, in consideration of money in hand paid by *C.* *A.* promises to assign this judgment to *C.* this was held a good promise, for that it was lawful so to do, and a letter of attorney might be made to *C.* to take out execution in the name of *A.* which might be done without maintenance. *Loder v. Chessin. 1 Syd. 212. 1 Keb. 744.*

12. And 'tis likewise proper to be known, that wherever the consideration, which is the ground of the promise, or the promise, which is the consequence or effect of the consideration, be unlawful, the whole contract is void. 1 *Bulst.* 38.

13. A promise or bond, not to use a trade in a particular place, is void, if it be without a consideration; and if it be a general restraint from using his trade, it is void, though there be a consideration. *Prugnell v. Goffe. Allen 67. Stile 11. 2 Bulst. 136. Rogers v. Parry.*

*14. Where *A.* promised *B.* that in consideration *B.* would procure *J. S.* to be presented, and instituted to such a chapel, which is a donative, and of the King's gift, *A.* would pay *B.* 20 l. upon request; and *B.* shews that he did procure him to be presented, &c. no action lies against *A.* for the breach of his promise, because it was simony in its nature, and illegal. 3 *Cro.* 337, 353. *Muckaller v. Toderick.* P *298.

2. It must be possible to be performed.

1. As a promise to go to *Rome* in three days, is said to be void; so if a promise be, that a man in *London* shall cover a house in *Hampshire*, while he is there at *London*, it is said to be void, because impossible. *Bend. 59, 90, 139. Bro. Action upon the Case, 107.*

2. So if *A.* the 9th day of *May*, promises to stand to the award of *B.* so that it be made before the 10th day of *May* next, and that *A.* have

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A. have notice fifteen days before ; or if *A.* for good consideration promises to make an estate of white-acre in *D.* worth 10 l. a year, whereas in fact it is worth but five pounds a year ; or if *A.* promises to be nonsuited in such an action, and there be no such action in being ; or if *A.* promises to assure such a piece of ground, and there be no such piece of ground ; in these and the like cases, such promises are void for the impossibility. *Co. Lit.* 206. *b. Perk. Sect.* 735.

3. Yet where the matter promised may be reduced to a certainty, though it be upon a condition that is impossible, the promise shall be good ; as where *A.* is indebted to *B.* in 10 l. and upon this *C.* promises *B.* that in consideration he will forbear *A.* till such a day, if *A.* does not pay him upon that day, he himself will pay him upon that same day ; this is a good promise, upon which *B.* may have an action against *C.* for though *A.* had the whole day to pay it, and then it was impossible for *C.* to pay it upon that day, on default of *A.*'s not paying it on the same day ; yet the substance of the promise being to pay in default of *A.* and the time limited being impossible, is void, and then it ought to be paid upon request, upon *A.*'s not paying it at the day. 1 *Roll's Abr.* 15. *pl.* 6.

3. As to the Certainty.

1. Where a man promises he will pay a sum of money, and does not say when, it is good enough, and must be paid presently ; so if a man makes a lease for years, and says not when to begin, this is certain enough, and it shall be construed to begin presently. 10 *Co.* 76, 102.

2. But if *A.* promises *B.* to deliver him goods, or make him a lease, or the like, and no time is set when it shall be done, the promise is certain enough, but the party has all his life-time to perform it in. 6 *Co.* 3. 10 *Co.* 77.

3. If *A.* be about the business of *B.* and *B.* promises *A.* that he will repay him whatever he lays out, this is certain enough. *Het.* 122.

4. If one in consideration promises to deliver goods, in consideration the other promised to pay money in a short time, this promise is said to be void for the uncertainty ; so where *A.* sells a horse to *B.* for the price that *B.* should value him at. 1 *Bull.* 92, 97. 2 *Cro.* 250.

5. Where the plaintiff declared, that in consideration of 40 s. paid the defendant, he promised to deliver the plaintiff twenty quarters of barley the next seed-time ; this was held a good promise, and certain enough. *Godb.* 950. *Totnam v. Hopkins.*

6. If *A.* in consideration that *B.* will marry his daughter, promises to give her a child's part ; and that at the time of his death, he will give her as much as to any of his children, except his eldest son,

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son, this is a good promise; for though a child's part is in itself altogether uncertain, yet the promise being to give so much as to any of his children, *the promise is certain enough, it being averred P *299. what the rest of the children had, except the eldest. *Popham* 148.

Silkester's Case.

7. If *A.* promises *B.* all that *A.* recovers in such a suit or upon a composition upon such a bond, this is certain enough, because it may be made so. *Morris v. Badger, Trin. 9 Jac. 1. Palmer* 168.

8. If *A.* in consideration that *B.* will marry his daughter, assumes and promises to give to *B.* twenty *French* pieces, this is a good promise; for this, according to our usual speech, shall be intended *French* crowns, which are the common coin of *France*, and here known. *Trin. 6 Car. between Poynter and Pointer. Cro Car. 194.* adjudged.

9. If the plaintiff declares, that whereas there was a communication between the plaintiff and defendant concerning the bark of certain wood; and that thereupon it was agreed, that the defendant should give to the plaintiff two shillings *per* seam, for all the bark of such wood, as the plaintiff should cut; and that thereupon the defendant assumed, and promised to have ready upon a certain day, articles purporting the agreement, and an obligation for performance thereof, &c. the declaration is not good, because not said in what sum the obligation was to be; and a certain sum cannot be intended, because the number of seams are altogether uncertain. *Trin. 17 Car. between Please and Palfry. 1 Syd. 270. per curiam*; but being after a verdict upon the general issue, it was adjudged for the plaintiff; but *per curiam*, upon demurrer, or a special issue, it had been naught. *1 Keb. 776. Hob. 69. 1 Brownl. 11. Mod. 70.*

10. But if there be an agreement to enter into an obligation for performance of a thing of certain value, without mentioning in what sum, it shall be intended according to the value. *Trin. 17 Car. 1 Syd. 270. per curiam.*

11. In an *assumpsit*, the plaintiff declared, that the defendant in consideration, &c. six months before the return of King *Charles II.* assumed to pay 20 l. to the plaintiff, if *Charles Stewart foret Rex Angliae infra 12 Menses tunc prox' sequent' &c. Pasch 12 Car. 2.* between *Andrews and Hern*; adjudged a good promise, and that it shall be taken according to the subject matter, *viz.* That the King, that was then out of possession, should be in possession within six months. *1 Keb. 56, 65.*

There are two Sorts of Promises, Express or Implied.

1. An express promise is where a person promises, that he, or some other person will pay a sum of money, build a house, seal a

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bond, make a lease, or such like, for some consideration annexed to such promise.

2. And an express promise will give an action, when otherwise the plaintiff must have had recourse to some other action; as where a box and goods are delivered to a man which he promises to dispose of; 'tis no plea for the defendant to say, that the defendant was the plaintiff's bailiff, and that therefore he ought to be charged in an action of account. *Wilkin v. Wilkin.* 1 *Salk.* 9.

3. And an express promise will lie for rent, although there be a lease. 1 *Lev.* 205. *Chapman v. Southwick.*

4. An express contract takes away the contract implied by law; as where an action was brought against an infant; and the case was, that his mother bound him to a *Russia* merchant, and the *Russia* merchant committed the care of the infant to the plaintiff; the action must not be brought against the infant, but against the *Russia* merchant. *Allen* 94. *Duncomb v. Tickridge.*

P * 300. 5. An implied promise is such as is raised by implication of law upon the nature of the case, as where a man sells, and delivers goods to another, though he cannot prove an express promise to pay for them, the law will imply a contract or promise to pay for them; and where the price is not ascertained between the parties, the law implies that the *defendant promised to pay for such goods, so much as they were worth; so if a man sets another to work, and no price is agreed, nor an express promise to pay, the law implies, that the person, who set the man to work, contracted with him, and promised to pay him so much as he deserved.

6. The father gave goods to the son, in consideration that the son would pay the plaintiff 20*l.* this was held to be a good promise, raised by implication of law, for if by any intendment, there may be a debt due to the plaintiff, the *assumpsit* shall be good; and though the contract was not between the plaintiff and the defendant, yet there was a contract, and the goods were given for the benefit of the defendant; and here is a promise made by implication of law to the plaintiff, though there be not a promise in fact. *Salk.* 296. *Starkey v. Mill.*

7. Where a bargain is made, and earnest given, yet the remainder of the money must be paid on taking away the goods, unless any other time is appointed for the payment of the money; for the earnest gives the vendee only a right to demand such goods; but if he does not come in a convenient time to fetch them away, and pay the rest of the money, the contract is dissolved. 1 *Salk.* 113. *Langfort v. the Administrators of Tyler.*

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On implied Promises you may declare by way of a general *indebitatus assumpsit*, and here shall be inserted the cases that have been adjudged where a general *indebitatus assumpsit* lies.

1. It is said in *Salkeld*, that an action upon an *indebitatus assumpsit* will lie in no case, but where debt will lie for the same thing. *1 Salk. 23.*

2. Where one receives money to the use of another, it will lie against the receiver. *1 Salk. 24.*

3. And where one pays monies upon a mistake it will lie, or where the defendant received the same by any deceit used to the plaintiff. *1 Salk. 22. Tomkins v. Barnet.*

4. As where a man pays money upon a policy of assurance, supposing that there had been a loss, when there was none, in such case, this shall be money received to the use of the payer, because the money was paid on a mistake; the like, if it had been received by a fraud in the receiver. *Skinner 412. Tomkyns and Barnet, 5 W. & M.*

5. But where a man pays money knowingly on an illegal consideration, there the party that receives it ought to be punished for his offence, but the party that pays it is likewise *particeps criminis*, and there is no reason he should have his money again; as where a man pays part of the money upon an usurious bond, he shall not have it back again, though by the statute of usury he may avoid the bond. *1 Salk. 22. Tomkins v. Barnet.*

6. It lies on a promise to pay 50 l. in consideration of a note of 50 l. under a third person's hand delivered by the plaintiff to the defendant; for the note being evidence of a debt having been due, the parting with it is a good consideration. *1 Salk. 25. Meredith v. Short.*

7. It lies not for money due upon a wager, because it there becomes due in a collateral respect; for to make that charge good, there must be work done, or some meritorious act, for which debt would lie. But it will lie against him who holds a wager by him that won; because it was at first a gift on a condition precedent; and the cast of a die, or whatever else be the proof of the party winning it, vests the property in the winner, if the money be staked down immediately. *5 Mod. 13. Walker v. Walker.*

8. A. promises B. that when A. receives 100 l. which C. owes, that he will pay B. 10 l. an *indebitatus assumpsit* will not lie on this promise, otherwise if it had originally been the money of B. *Skynner 196. Anonymus.*

*9. An *indebitatus assumpsit* for freight is good, without mentioning P *301. what the freight consisted of. *1 Ven. 100. Prior v. Sheers.*

10. It lies for the lord of a copyhold manor, for a customary fine. *Cumb. 151. 1 Show. 35.*

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11. It lies *pro opere & labore* in serving on a commission. *Cumb.* 186.
12. It lies against the holder of stakes upon a wager. *Cumb.* 303. *Walker v. Walker.*
13. If a man receives more money from me in a reckoning than he ought, or more for fees than he ought to take, it has been held an *indebitatus assumpsit* will lie. *Cumb.* 447.
14. An *indebitatus assumpsit* lies not upon a corrupt bargain, or for money gained by a cheating trick. *Cumb.* 341.
15. It lies for money received to the use of him named in the policy; for money paid as a *præmium* on a void policy. 1 *Show.* 157. *Martin v. Sitwell.* *Skinner* 412.
16. An *indebitatus* will not lie for rent; but ('tis said) it was held to lie upon a personal promise grounded upon a real contract, and the express promise must be alledged and proved, 3 *Modern* 240. and the party declared for so much for the occupation of a certain house; and where no certain sum is reserved, a *quantum meruit* will lie for the occupation, &c. 3 *Mod.* 73. *Mason v. Beldham.* See 2 *Show.* 135. *Pilkington v. Peach.* 3 *Lev.* 150. *Johnson v. May.* 2. whether it is absolutely necessary to prove an express promise.
17. It lies for money lent. 2 *Brownl.* 40. *Anonymus.* But it will not lie for money lent to an infant, though for necessaries. *Salk.* 279. *Darby v. Boucher.*
18. It is said in *Skineer* 326. in the case of *Francom* and *Foster*, that Ch. Just. *Holt* held, That where a man agrees to pay such a sum at three several days, he may not declare for this sum till the days are passed, but when the days are passed, a general *indebitatus assumpsit* lies: But if it be agreed, that upon failure of payment of any part, then to pay the whole. 2. If it lies not for the whole. *Trin.* 7 *Geo.* 1. *Mod.* *Cases in Law and Equity*, 56.

Of Mutual Promises.

1. Executory contracts differ from mutual promises, where one promise is the consideration of the other, though in both cases something is to be done by both parties after the time of making the promise. In the first, the consideration of doing an act, is the foundation and ground for the performance by the other; as where one, in consideration of a thing to be done by me, promises to pay me money, or do somewhat for me; now before I can have an action for this money, and for the parties not performing what he was to do for me, I must aver, that I did that which I had undertaken to do, at the time and place appointed for that purpose. But in the second instance, if another, in consideration that I promise to do such a thing, he promises to do another thing for me, or to pay me money

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money at such a day, I need not alledge that I performed what I had promised, but I may have an action against him for his not performing his promise to me; because the consideration and foundation of his promise to me was the promise I made to him, and he accepted that as a consideration, and has a right of action against me for my non-performance.

2. In *assumpsit* upon mutual promises, where the plaintiff was to deliver corn, and the plaintiff had paid part, and was to pay so much, the residue, the defendant pleaded, confessing the bargain, but that the defendant had not paid the residue; the plaintiff replied, that such a day he tendered the residue, but does not say where; held that it is immaterial; for there needed no averment that he was ready, because they were mutual promises, and the parties had mutual remedies. *Cumb. 256. Mansfield v. Stephen.*

*3. But yet where there are mutual promises, if one thing be the consideration of another, there a performance is necessary to be averred; as where the defendant agreed to pay the plaintiff so much money in six months, the plaintiff agreeing to transfer so much stock, and the plaintiff at the same time gave a note to transfer so much stock, the defendant paying, &c. the one must aver a transfer, or a tender, and the other payment, or a tender. *Salk. 112. Callonel v. Briggs.* P *302.

4. So where the plaintiff promised he would pull down two walls, and build an house, and the defendant promised to pay him 8l. and then an averment of mutual promises; there the plaintiff ought to have shewn he had pulled down the walls, &c. 1 *Ven. 177. Peter v. Ophil. 2 Saund. 353. 2 Lev. 23.*—And in the following case, the Ch. Just. Holt is said to have laid down this rule in executory contracts, if the agreement be, that one shall do an act, and for the doing thereof, the other shall pay, &c. the doing of the act is a condition precedent to the payment, and the party who is to pay, shall not be compelled to part with his money, till the thing be performed for which he is to pay. *Vide 15 Hen. 7, 10, 6. 1 Ven. 177, 214.* But upon this rule there are two diversities.

First, If a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done; for it appears the party relied upon this remedy, and intended not to make the performance a condition precedent. 48 *E. 3. 23. 7 Co. 10. b. 1 Vent. 147. 1 Saund. 319.*

Secondly, Where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract, in such case, performance is a condition precedent, and must be averred in an action for the money; and so is 1 *Jones 218.* to be understood. *Vide Dyer 76. pl. 30 contra,* and 1 *Roll. 414, 415.* But these and some other books which are contrary

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trary (*says the book*) are not law; for every man's bargain ought to be performed as he intended it; when he relies upon his remedy, it is but just that he should be left to it according to his agreement; but on the contrary, there is no reason a man should be forced to trust, where he never meant it. And therefore if two men should agree, that the one should have his horse, the other, that he will pay ten pounds for him, no action lies for the money till the horse be delivered; *Vide Dyer 30. pl. 203. 2 Mod. 33.* was denied. Judgment *pro Quer'* in C. B. and now affirmed upon a writ of error in B. R. 1 *Salk. 117. Thorpe v. Thorpe, Lut. 251, 252, 253.*

5. Where it has been held, that upon mutual promises, performance need not be precisely alledged by the plaintiff. 1 *Lev. 88. Anonymus. 1 Roll's Rep. 336. Spanish Ambassador v. Gifford. 2 Mod. 34.*

6. Mutual promises must be both binding, as well of one side as of the other. *Salk. 21. Harrison v. Cage and his Wife*, and both made at the same time. *Hob. 88, Nichols v. Rainbred.*

7. In an action upon the case, upon mutual agreements, the evidence was a note, signifying that A. R. had bought of H. one hundred pieces of muslin at 40 s. *per* piece, to be fetched away by ten pieces at a time, and to be paid for as taken away; it was held that the property in this case is altered, and they remain only a security for the money, and that if they are not taken away in a reasonable time, the party may have an action for his money, but cannot sell the goods; and though there be no actual promise to deliver them, yet in as much as they were to be paid for when taken away, the law implies a promise to deliver them. *Trin. 8 W. 3. Knight v. Hooper, Skinner 647.*

8. Where there are mutual promises, and one of the parties dies, whereby the other party could not charge the executor on the promise of the testator, yet the promise by the survivor shall continue; as adjudged in the case of *Bettisworth v. Campion, Yelv. 133.*

P *303. *And here it will be Necessary to shew somewhat concerning the Notice and Request.

First, *As to the Notice.*

1. All contracts being executed or executory: executory, as where all, or part of the thing agreed upon is to come; as that if you shall build me a house, or that if you bring me in so much corn, by such a day, I shall pay you in so much money, or the like: executed; as where you promise to pay me 20 l. in recompence of a house I have built at your request; or where you promise to sell me your horse for 10 l. laid down and received.

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2. In the first of these contracts, no notice need be given. But in the second, notice must be given and alledged, that you have uilt the house, or that you have delivered the corn, &c. See 3 *Bulst.* 44.

3. Where the matter to be done doth rest in the equal knowledge of the parties what is to done, there no notice need be given by the one party to the other, what is done.

4. But where it is more in the knowledge of him to whom it is to be done, there it is necessary that he give the other notice what is done:

5. When it rests upon a matter to be done between the parties themselves, notice is to be given to the party who is to make a payment of money, upon an act to be done by the other, to whom the payment is to be made; but otherwise where 'tis to be done by a stranger, for there he is to take notice at his peril. *Powle v. Hagger*, 2 *Cro.* 492.

6. Where a duty doth arise upon a private act of the plaintiff, there notice must be given of it before the action can be brought; for else the breach may be so private, that the defendant by no possibility can know it without notice.

7. Where a thing is to be done by a stranger, and lies as much in the knowledge of the defendant as of the plaintiff, he is not bound to give notice to the defendant, *March* 108. as where the plaintiff sold the defendant barley who was to give him as much for it as any other did; the declaration is not good, shewing that J. S. gave so much for it, without notice of it; but if it had been that the defendant was to give so much for it, as J. S. gave, it is said that the defendant ought to enquire of J. S. and no notice is necessary. 2 *Cro.* 43. — *v. Henning.*

8 In case where a penalty is to be recovered for the not doing the thing, there notice must be given. 1 *Cro.* 34, 385. 2 *Cro.* 492. 1 *Bulst.* 12, 13. *Hob.* 51. *Hut.* 80.

In what other Instances a Notice has been held Necessary, and where not, relating to

Cole's Case, *Cro. Eliz.* 97. A promise to save harmless.

Cro. Eliz. 298. *Stafford v. Bottone.* Assurance of lands.

834. *East v. Thoroughgood.* The sale of lands.

Yelv. 168. *Brenley v. Todd.* Marriage.

Allen 21. *Fyner v. Jeffrys.* Payment of money in consideration of forbearance.

Stile 184. *Johns v. Lewiston.* A promise to enter into a judgment for so much as Sir J. H. owed the plaintiff.

Stile 53. *Tanner v. Lawrence.* A promise to pay so much for every cloth he should buy for the defendant. *Allen* 24. S. C.

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Stile 74. *Parmiter v. Cressley*. A promise to deliver wines.
2 Roll's Rep. 462. *Eykins v. Moor*. A promise to save harmless.
1 Leon. 123. *Dollaby v. Hassell*. A promise being to pay what would content the plaintiff.

P *304. **Cro. Eliz.* 132. *De Bewoy v. Hassell*, signifying that the plaintiff was content to take so much.

2 Cro. 432. ——— *v. Henning*. Relating to the price of barley, that the plaintiff should have of any body else.

Winch 102. *Brown v. Ware*. } The payment of money upon
Haverleigh v. Laighton, *1 Bulst.* 12. } request.

Secondly, *As to Request.*

1. In all cases, where the ground of the action is for a debt, there the law induceth the promise, and the request is not issuable, nor parcel of the consideration; so where there is a right to a duty in the plaintiff before, there the general *licet sæpius requisit'*, &c. is sufficient; but where the request makes it a duty, there the request must be precisely alledged. *2 Cro.* 183. *Selman v. King* and others.

2. A promise upon a consideration executed or past, unless 'tis grounded on a precedent request, is not good; but where the consideration arises from the request, the promise is good; as for instance, when a promise is made at the time of the request, then the consideration is meritorious; as for example, if I promise to pay 10 l. because *W. R.* was bail for my servant, that is not good; but otherwise is it, if I promise to pay 10 l. because the plaintiff was bail at my request *postea*.

3. Where the money is to be paid, or any other thing to be done upon request, there must be a precise request alledged.

4. Also where the action is founded upon a collateral matter, and not for meer debt or duty, there the request is issuable, and ought to be expressly alledged.

5. And so in all cases where notice is to be given, or a request, or a demand to be made, to produce and warrant the action, the same must be set forth to be made and done accordingly. *1 Cro.* 179, 280, 281. *2 Cro.* 183, 652. *2 Bulst.* 229. *3 Bulstr.* 297, 327. *Yelv.* 66, 67. *Leon.* 73. *pl.* 159, 167.

6. Where a request is to be set forth, there it is material and traversable, and therefore the time and place thereof must be certainly set forth.

7. Where in consideration the plaintiff, at the request of the defendant, would procure an order to him, to pay another's debt, that he would pay it; 'tis sufficient to alledge that he procured an order, without saying at the defendant's request; but the agreement had

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had been to procure an order when the defendant requested it, 'tis otherwise. *2 Vent. 75.*

8. An action upon the case, upon a promise to do a thing upon request by an executor, and alledged the thing not done, *licet scipius requisit* by the testator in his life-time, and then alledges a special request by himself, is good; for the ground of the action is the testator's request, which is well alledged, *Har. 39.* and in this case, if the plaintiff replies, that no request was made by the testator, and upon this issue the jury find no request, yet the issue and verdict is good, and not repugnant to the declaration, for the *licet scipius, &c.* is nugatory and surplusage, and therefore void; and what is alledged afterwards contrary to it, is no real contradiction.

1 Hard. 41.

9. In consideration that the plaintiff would buy land of the defendant, and pay him 40 l. for it, the defendant promised to pay the plaintiff 9 l. which *J. S.* owed him; there this being a collateral matter, a request ought to have been alledged. *Hill v. Wade, 2 Cro. 523.*

10. An action upon the case was brought against the defendant, declaring, that the defendant promised, that his son should pay the plaintiff so much money for boarding him, when he should be thereto required: by *Roll Ch. Just.* this is a collateral promise, and therefore the request must be averred to be made to the son. *Stile 207. Williams v. Mead.* P *305.

11. The request must pursue the contract; as where the defendant requested the plaintiff to lend the son of the defendant 5 l. for six months, and that at the end of the six months, if the son did not pay it, that then, at the end of the year next ensuing the lending of it, the defendant would pay it the plaintiff, upon request; this request being made within the year was held ill, for at the end of the year the defendant promised to pay, upon request. *2 Roll's Rep. 88. Passerd v. Webbe.*

In what other Cases under this Head a Request is necessary, and where not, relating to the following Particulars, see the following Cases.

Cro. Eliz. 85, Deverley v. Welbore. } The delivery of goods pursuant to agreement.

Cro. Eliz. 91. Osbaston v. Garton. }

Cro. Eliz. 229. Applethwait v. Northy. To a marriage.

299. *Oke v. Kirby.* To forbearance.

1 Saund. 33. Birks v. Trippett. To the payment of a penalty or collateral sum.

Cro. Eliz. 73. Morris v. Kirke. To a promise to pay money laid out and expended.

Noy 98. Murton v. Burtley. To an *in simul computasset.*

Wynch

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Wynch 2. *Bartlet v. Bartlet.* To an *infirmul computasset.*

Brownl. 13. *Gore v. Calthorpe.* To collateral matters that are not duties

Godb. 144. *Anonymus.* To payment of money for labour to the plaintiff's content.

Godb. 437. *Case* 502. *Shutford v. Borough.* To a promise to recompense the plaintiff for damage done to sheep upon request, in consideration, the plaintiff would not sue, and would suffer the defendant to carry away the sheep.

Godb. 274. *Hill v. Wade.* To a promise of payment of money on request.

Stile 141. *Smithson v. Wells.* To a promise to save harmless.

Stile 172. *Harris v. Gibbons.* To a promise to pay for all wine and hops spent at *Sturbridge* fair.

Other cases concerning a request, *vide* 1 *Leon.* 129. *Case* 167. *Delaby v. Hassell.*

1 *Cro.* 454. *Phillips v. Sackford.*

Noy 95. *Alcock v. Blowfeild.*

1 *Brownl.* 13. *Gore v. Cathrop.*

2 *Brownl.* 279. *Rivet v. Down.*

And for more Cases under this Head, see the Appendix hereafter.

Thirdly, *How a Promise must be performed, and how it may be discharged.*

Before we treat of the performance of contracts, it must be considered, that contracts and agreements, wherein *assumpsit* lies, are very much to be governed by the rules of equity, and therefore it is necessary to understand,

1. *That the Promise need not be pursued precisely according to the strict Letter, if so be the Performance be according to the Substance of it.*

2. *The Intent of the Parties is to be pursued, and if sufficient Certainty does not appear in every Particular, the Law will make a Certainty by Construction.*

P * 306. * 3. *The Law must construe the Intent of the Parties, where an express Intent does not appear, most beneficially for the Party, to whom the Promise is made.*

For the Illustration of which observe,

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As to the First.

1. That if *A.* promises to convey land to such a person as *B.* shall name, and he conveys it to *B.* himself, who accepts of it, this is a good performance.

2. If one promises to another, in consideration of one hundred pounds, to enfeoff him of a piece of land, upon request, and he to whom the promise is made requests it, and the other refuses, but afterwards, and before any action, does it, which is accepted; this is a good performance, pleaded rightly. 1 *Bulstr.* 38.

As to the Second.

3. If a promise be for a sale, or delivery of tods, pounds, &c. it shall be taken and accounted, measured and reckoned, according to the custom of the place. *Plow.* 41, 140.

4. Where *A.* promises he will make sure to another a portion of six hundred pounds, by this it shall be taken that he promises she shall be worth so much. 3 *Cro.* 202.

5. If a man promises to pay so much, when *J. S.* comes from *Rome*, it ought to be paid within a convenient time after his return. 1 *Rolls Rep.* 336.

As to the Third.

6. If one promises to pay money, and no time is set, the law will construe that it must be paid presently; because it is more for the benefit of him to whom the promise is made, that it should be so. 10 *Co.* 76.

7. So if a man for the same reason promises to make a lease for years, and says not when it shall begin, the law will construe it to begin presently. 10 *Co.* 33.

8. So if a man promises to make a feoffment, surrender or the like, by this the law will imply it was intended a good feoffment, surrender, &c. *Dyer* 23, 75.

9. If a promise be made to enter into a bond to pay money, and no sum is expressed, the sum is to be twice as much as the money to be paid; and if it be to do another thing, then it shall be a reasonable sum to be governed by the value and quality of the act to be performed. 2 *Cro.* 652.

10. If a promise be to give a bond with sureties, and say not what sureties, nor in what sum, the court shall judge of the same. *Hob.* 79.

11. If

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11. If a promise be, that J. S. shall dwell in a house during the term, this shall be taken for the whole term; but if the promise be, that such a one shall not do a thing, it is thereby intended that he shall not do it at any time during the term. 2 *Bulstr.* 136.

12. If one promises to deliver me goods, and he delivers me bad goods, this is a breach of the promise; for the law will construe the intent of the parties that they should be good. *Dyer fol. 75. pl. 23.*

1. As to the Performance.

1. Where the case was, that the defendant, in consideration that the plaintiff, at the request of the defendant, had exchanged horses with him, he promised to pay him 5 l. The defendant pleads, that the plaintiff, before any action brought discharged him of his promise. It was adjudged, that as no time was appointed for the payment of the money, it was due immediately upon request; and it not being paid, the promise is broken, and the parol discharge cannot be pleaded. 3 *Mod.* 259. *Edwards v. Weeks.*

P*307. *2. Where the plaintiff declared as executor of A. against H. B. that in consideration of two weighs of corn delivered by the testator to the defendant, he promised to pay, &c. defendant pleads, that the said two weighs were drowned by tempest; and in consideration that the defendant would pay to the plaintiff, for every 20 l. of the said 10 l. 3 s. 4 d. viz. in the whole 33 s. 4 d. he discharged the defendant of the promise, and averred, that he was always ready, &c. held to be no good plea. 1 *Leon.* 19. *Richards v. Bartlet.*

3. Where the defendant promised to carry certain apples for the plaintiff in his boat from *Greenwich* to *London*, and the apples being in the boat, in which they were by a great and violent tempest sunk in the river; it was held, that this matter could not be pleaded in discharge of the promise. 4 *Leon.* 31. *Taylor's Case.*

4. What held a good discharge of the damages by acceptance of a feoffment subsequent to the promise, and before the cause of action, though not a discharge of the promise. *Wolverton and his Wife v. Davie.* 1 *Bulstr.* 38.

2. As to the Discharge.

1. A. Promise may be discharged by the act of God, by the act of law, or by the act of the parties.

2. If a man promises to appear at such a day, or the next court or term, and dies before, the promise is discharged by the act of God.

3. Where

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3. Where the plaintiff declared, that the defendant's wife, in consideration that the plaintiff lent her a horse to ride, &c. that she promised to redeliver the horse upon request, &c. the defendant pleads that his wife was not requested before their marriage, and that before the request alledged, the horse died, whereby he could not deliver him; held a good plea; for a promise that becomes impossible is discharged. *Palmer* 548. *Williams v. Hide and his Wife*.

4. Where an *Assumpsit* was brought by husband and wife against *J. S.* executor of *J. S.* the plaintiff declared, that there was a communication of marriage between the wife of the plaintiff and the said *J. S.* and that the said *J. S.* in consideration she would marry him, he promised, that if after the marriage *J. S.* died, living the wife, he would leave her worth 100*l.* and it was held by *Hobart* chief justice, that by the intermarriage, the promise was extinguished by operation of law. 2 *Cro.* 571.

5. If one promises, that *A. B.* shall marry me before such a day, and before the day, he himself marries me, this promise is discharged by the act of the parties. 21. *E.* 4. 23.

6. If one lets land to another at my request to begin at a day to come, and I undertake for the payment of the rent, and the lessee enters before the day, which with an expulsion would have worked a disseisin, yet the promise is good as to the rent. 2 *Cro.* 684. *Brookbank v. Taylor*.

7. So if one promises to pay rent for such a person the lessee, and the lessor enters and suspends the rent, yet the promise remains; for the rent is not issuing out of the land, but merely collateral. 1 *Leon.* 172. *Shirley v. Albany*.

8. If the party that makes the promise, and he to whom it is made, agree that a bond shall be given for money due upon a promise, by this the promise is discharged by operation of law. 2 *Leon.* 181. *Case* 223. *Freeman and Drew's Case*.

9. If one promise to pay a parson money in lieu of tithes, and the parson dies before the tithes gathered, the promise is gone. 1 *Bulst.* 111.

10. If one in consideration that another hath lent him a horse to ride a journey, promises to redeliver, and before it can be done it is taken away by the owner, it is said in *Yelverton* 22. in the case *P* *308. of *Shelbury and Scotsford*, that this will discharge the promise.

11. If an *Assumpsit* be to stand to an award, and the award be void, it discharges the promise. 1 *Leon.* *Case* 170.

Fourthly,

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Fourthly, *The several Acts of Parliament relating to this particular Species of Actions upon the Case.*

The Statute of Frauds.

1. The act of 29 *Car. 2. cap. 3. sect. 16.* hath much altered the common law as to promises, *viz.* by that act it is provided, "That after the 24th of *June*, to charge an executor on a special promise to answer damages out of his own estate, or to charge the defendant upon any promise, to answer for the debt or miscarriage of another, or upon an agreement or consideration of marriage, or on any contract or sale of lands, tenements or hereditaments, or any interest concerning them, or on any agreement not to be performed within a year after the making, unless such agreement, or some note thereof be in writing, and signed by the party to be charged, or some other by him authorized."

2. Where the plaintiff declared, that in consideration he, at the request of the defendant, would let a certain gelding to *J. S.* the defendant undertook that the said *J. S.* should deliver it to the plaintiff; this was held to be within the statute; for the bailment is such, as in its nature required a redelivery; and if the bailee will not deliver the thing bailed, the proper remedy is an action of detinue against the bailee. Therefore this promise of the defendant's, that *J. S.* should redeliver the horse bailed, for which there is a remedy against the bailee, is a collateral promise, and is therefore a promise to answer for the act or default of another, within the intention of the act: So if two men come to a shop, and one of them contracts for goods, and the seller does not care for trusting him; whereupon the other says, let him have them, and I will undertake he shall pay you; this likewise is an undertaking for the act, and default of another; but otherwise would it have been if he had said, let him have them, and I will see you paid, or I will be your pay-master. *Modern Cases* 250. *Bourkmore v. Danrell.*

3. A promise to pay so much money upon the return of such a ship, which happened not to return in two years time after the promise made; that was held to be out of the above-mentioned statute, and it was said in this case, that the clause of the statute extended only to such promises, where by the express appointment of the parties, 'tis not to be performed within a year. *Salk. 208. Anonymous.*

4. Where the plaintiff had a former action against the defendant and two others, and declares, that in consideration he would forbear the defendant would pay him 10*l.* held to be out of the statute, because the defendant was a party. *Cumb. 362. Stevens v. Squire.*

5. A man contracts to pay 100*l.* upon the day of his marriage; this needs not to be put in writing, not being within the statute of frauds.

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frauds, the words whereof are ; “ That every contract not to be performed within one year after the making shall be put into writing.” So that the design of the statute was, that only those contracts that were impossible to be performed within that time, &c. Now this contract depends upon a contingency, that may, or may not be performed within the year ; and therefore is *Casus omisus* out of the statute, as was resolved by most of the judges, by information of *Holt* chief justice.

6. Where the case was, that the defendant sold a gelding to the plaintiff for eight guineas, upon this condition, that in consideration the plaintiff had paid the defendant the eight guineas, as the defendant promised, that if the plaintiff did not like the gelding, and delivered it to *Barham*, to the use of the defendant, that *Barham* should repay the plaintiff the eight guineas ; and if he did not, that the defendant would ; held that this was not a collateral promise for payment in default of another, but it was part of the entire contract upon the sale. 3 *Lev.* 363. *Masters v. Masters.* P * 309.

And here I shall insert a few Cases where the Action hath been adjudged well brought, and where not.

1. *Foster v. Taylor*, on money paid at several days, and action brought upon failure of the first payment. *Cro. Eliz.* 776, 807.

2. It was held, that an *indebitatus assumpsit* will not lie against the father for money lent to the son at his request ; for in respect to the father it is a collateral promise, upon which the plaintiff might have declared specially ; because upon lending to the son, the law cannot raise a promise by the father, but it will by the son. *Butcher v. Andrews*, *Carthew* 446.

3. An action brought by an administrator upon an *indebitatus assumpsit* to intestate, and on an *in simul computasset* with the administrator, for money due to the administrator, cannot be joined, because the costs to be recovered are entire, and then the plaintiff can never distinguish how much he is to have as administrator, and how much as his own. *Rogers v. Cook*, *Salk.* 10.

4. Where *deceit*, and an *assumpsit* was laid together, and held ill. *Benning Sage v. Ralphson*, 2 *Show.* 250.

5. When money is to be paid at several days, the action may be well brought at the first breach, but not so in debt. 2 *Roll's Rep.* 47. *Beckwith v. Pott.*

6. Brought by husband and wife, for money received of the wife during coverture, and ill. *Abbott and his Wife v. Blofield.* 2 *Cro.* 644.

7. Administrator sues the defendant on one promise to the intestate, and another in her own right, and held ill. 3 *Keb.* 323. *Courties v. Daws.*

8. An

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8. An action upon the case by an attorney, upon an *infirmul computasset*, is held to be out of the statute of King James the first; so that no bill or note need be delivered to the defendant before the action brought. 1 *Show.* 48. *Jordan v. Powell.*

9. Where the defendant gave the plaintiff an attorney so much in hand to defray his charges, and promised to pay him what more he should lay out. It was held, that the statute of 3 *Jac.* 1 *cap.* 7. of delivering a bill, did not extend to a special promise. *Allen* 4. *Evely v. Livermore.*

10. If an action is brought upon an agreement to pay so much for every ton of iron that shall be delivered, no action can be brought for half a ton; so it is to pay so much to a clerk *per quire* for writing; but if one promises, who puts out his daughters to board to learn needle-work, to pay for a year's board, an action will lie for the daughters board, for any time not exceeding a year, for that shall be construed the intent of the agreement. 1 *Syd* 225.

11. Where 4 l. was to be paid at five shillings *per month*, the action was brought before the whole payable, and held good. *Beckwith v. Nott.* 2 *Cro.* 504.

12. So where several sums are awarded to be paid at several times, an *assumpsit* lies for every sum, as it becomes due. 2 *Saunders* 337. *Cooker v. Worwood.*

P *310. *This Action upon the Case, grounded on an *Assumpsit*, is to be brought on Bills of Exchange, and Promissory Notes; and the Method here taken to distribute the Cases in the Books relating thereto, is in the following Manner.

First, *Of Bills of Exchange and Promissory Notes, what they are, and where Good.*

Secondly, *Of the Drawer.*

Thirdly, *Of the Person upon whom a Bill is Drawn.*

Fourthly, *Of the Person to whom a Bill is payable, and therein of the Bearer or Indorser.*

Fifthly, *Of the Protest.*

Concerning Declarations and Pleas, and other Incidents relating thereto, see hereafter in the Titles of Declarations and Pleas in this Action.

First, *Of Bills of Exchange, what they are, and where good.*

(Vide, *Bailie on Bills of Exchange, per Tot.*)

1. The essential part of a *bill of exchange*, is its being in writing, containing sufficient words to constitute that instrument, according

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to the intent of the mercatorial law, and the acts of parliament relating thereto.

2. Foreign *bills of exchange* have been of ancient use, and have been found of great benefit to commerce. For the ease and safety of transmitting from one kingdom to another valuable considerations for merchandizes, whereas money cannot be so easily and safely transmitted and paid as by such bills; and as *bills of exchange* tend greatly to the benefit of commerce, there are annexed to them many privileges that are not annexed to instruments of a superior nature.

3. One of the privileges of these instruments of trade is, that they are negotiable and assignable from one person to another; whereas a bond (*unless a bail-bond, and that by a particular act of parliament*) is not assignable, so as to vest a power in the assignee to sue thereupon in his own name; and whoever has the custody of these bills, with a proper indorsement thereon, has the legal property therein, and is entitled to receive the money due thereon. *Stile* 336. *Anonymus*.

4. The usual words which constitute a *bill of exchange* are, signifying that the same is drawn by one or more persons upon, and directed to one or more persons, thereby requiring the person or persons, to whom it is directed, to pay a sum of money therein-mentioned, to any other person or persons, or to him or them, his or their order, or to the bearer on demand, at sight, or at a time therein specified for value received; though the words *value received* are not essentially necessary.

5. And it hath been adjudged, where a bill was drawn in this manner; *Sir, You are to pay to Mr. Jenny, so much Money, out of the Money belonging to the Governors and Company of Devonshire Miners, directed to one John Pratt, Esq; their Cashier*, that this was not a good bill of exchange.

For this is no more than a direction or appointment to the cashier to pay the money, and doth not answer the necessity of trade; for it is not negotiable as a bill for money; therefore it would be ill convenient to the drawer; for if he might be charged on such a note, then any man, who gives his steward an order, or authority to pay money, might be charged for non-payment.

Besides, 'tis the substance of the drawer, which is always considered in bills of exchange, for it is that which makes them negotiable; but this new invention of drawing bills on cashiers to pay money out of funds, makes no difference between the best and worst man as to his substance. P * 311.

'Tis true, there are three persons named in this note, of which the cashier of the company is one; and this is all which makes it like a *bill of exchange*, though there are such bills between two persons, as where they are made payable by themselves, for so are goldsmiths notes. Now if this note had been accepted by the

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cashier, and he had died without paying the money, certainly his executor could not be charged.

'Tis true, custom hath carried *bills of exchange* a great way, but never so far as to make them payable out of any particular fund; and for these reasons, the judgment in the Common Pleas was reversed, upon a writ of error in the King's Bench. *Mod. Cases in Law and Equity* 267.

6. A bill for the payment of money when the defendant should marry *A.* was held to be not a good *bill of exchange*. 4 *Mod.* 244.

7. As it has been said before, the words *value received* are not essentially necessary to a *bill of exchange*; if *value received* be mentioned therein, the drawer is liable at the common law; if it be not, then by the custom of merchants. *Show. 5. Mod. Cases in Law and Equity* 267. 2 *Keb.* 695. *Brown v. London.*

8. Interest on a *bill of exchange*, commences from the demand; if no demand be made till the action brought, the defendant may plead tender and refusal, and that he is ready to pay, to discharge himself from interest. 6 *Mod.* 138.

9. These instruments of paper credit every day more and more gaining the esteem of the trading part of the nation, it was thought proper by the legislature, to give encouragement to promissory notes in writing, whereby the party drawing the same, did not direct money to be paid by another, but promised payment himself; and these notes are now made assignable by the following act of parliament.

10. By the 1 Stat. 3 & 4 *Annæ* cap. 9. "All notes signed after the first of *May*, 1705. by any person, &c. whereby any such person, &c. shall promise to pay any other person, &c. or order, or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c. to whom the same is made payable; and also such note payable to such person, &c. or order, shall be assignable over in manner as inland *bills of exchange* are; and the person, &c. to whom such money is payable, may maintain an action for the same, as they might upon *bills of exchange*; and the person, &c. to whom such note so payable to order is assigned or indorsed, may maintain an action against the person, &c. who signed, or any who indorsed the same, as in cases of inland bills, and recover damages and costs of suit; and in case of non-suit, or verdict against the plaintiff, the defendant to recover costs against the plaintiff."

11. Such actions to be brought within the time appointed for bringing actions per 21 *Jac.* 1. cap. 16.

12. An action was brought against the drawer by the second indorsee, upon a note given in these words, *viz.* *I promise to Account with T. S. or his Order, for 50 l. Value received by me, &c.* This

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This was adjudged in the behalf of trade, a good note, and the act of parliament a remedial law, for which reason it shall be extended as far as possible; therefore the words in this note, by which the drawer promises to be accountable to T. S. for 50 l. shall be construed as a promise to pay the money, and the rather because 'tis to be accountable to T, or his order, but 'tis impossible for him to account with the indorsee; therefore it must be to pay; besides, this must be originally either a debt or a trust, and nothing appears in the note to make it a trust, therefore it must be a debt.

*As to the objection that the drawer may be a factor, and might apply this money for the use of the drawee, the words in this note will not make him a factor, viz. *I promise to be accountable for so much money, &c.* for the money must be received to account, as well as the promise made to account, therefore the word *accountable* in this case shall be taken to pay; and the difference is, when 'tis to be accountable for *value received*, and when it is *value received on account*, or *to account*, or as *per account*, as 'tis usual between merchant and factor, or lord and steward; and it would be dangerous to the credit of those notes, if this should not be good; therefore judgment was given for the plaintiff. *Mod. Cases in Law and Equity*, 363, 364. *Morrice v. Lea.* P * 312.

13. In an action of debt on a promissory note, the defendant demurred to the declaration; and the question was, whether an action of debt would lie; it was said that it would not lie against the indorser, but that it would lie against the drawer.

14. The statute of 9 W. 3. puts inland bills of exchange upon the same footing with foreign bills, where the money is recoverable by the custom among merchants upon the signing such bills; and the statute 3 Anne puts promissory notes on the same footing with inland bills, and enacts, that the assignee, or endorsee, may maintain an action against the drawer or endorser and recover damages, &c. which shews, that an action of debt will not lie, because damages are never recovered in debt.

15. If the plaintiff had not declared on the note, which he had done in this manner, viz. That the defendant *onerabilis fuit per notam*, he should have judgment; but an action of debt was never known to be brought on a bill of exchange or note; if he had declared on an *indebitatus assumpsit*, he might have recovered in damages; the plaintiff had leave to discontinue. *Mod. Cases in Law and Equity*, 373, 374.

16. Where a note is, *I promise to pay to R. or Order 100 l. on Account of Wine had of him*, it was held a good promissory note. *Mod. Cases* 29. *Buller v. Crips.*

17. A man may not declare in debt on a promissory note, though he may upon an *indebitatus assumpsit*. *Welsh v. Creagh*, *Mod. Cases in Law and Equity*, 373.

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Secondly, *Of the Drawer.*

1. Where a man draws a *bill of exchange*, he subjects himself to the payment of the money, if the person upon whom it is drawn refuses either to accept or pay it; yet it is with this limitation, that if it be not paid in a convenient time, the person to whom it is payable shall give the drawer notice; for otherwise the law will imply the bill paid, because there is a trust between the parties; and it might be prejudicial to the commerce of the nation, if the bill should rise up to charge the drawer at any time, when in the mean time all reckonings and arrears are adjusted between the drawers and the persons to whom such bills are directed. *Salk.* 127.

2. The drawer is always liable, though there be no tender for the payment, or the bill be not protested at the time, unless the person on whom it is drawn break, and then it is otherwise; for the party who paid money for the bill loseth it. *Show.* 319. *Mogadara v. Holt*, 2 *Keb.* 105.

3. If a *bill of exchange* be indorsed, and not paid, you must give notice to the drawer. *Mod. Cases in Law and Equity*, 43. *Lawrence v. Jacob*.

P * 313. *Thirdly, *Of the Person upon whom a Bill is drawn, who if he accepts the Bill, is properly called the Acceptor.*

1. This acceptor, whether value be mentioned in the bill or no, is supposed to have effects of the drawer's in his hands, sufficient to answer the money therein directed to be paid; if he has not, but has effects to answer part, he may accept it as to part, or to part in money, and part in bills, and there may be a protest for the residue. *Cumb.* 452.

2. If he accepts it for payment, and does not pay it, a special action lies against him for non-payment, pursuant to such acceptance; 2 *Show.* 8, 459, 510. but it was held that no *indebitatus assumpsit* will lie against the acceptor, because his acceptance is an engagement collateral to the bill. 1 *Salk.* 23.

3. A bill once accepted cannot be revoked by the party that accepted it, though immediately, and before the bill becomes due, he receives advice, that the drawer is broke. *Lex Mercatoria* 274. *Malyn's Advice of Bills of Exchange*, fol. 20.

4. If one merchant having a right understanding with the person that brings the bill, and says, *Leave it with me, and I will accept it*; this by the custom of merchants obliges him as effectually, as if he had signed it.

5. If a bill be accepted, and the person who thus accepted it dies before the bill is become payable, there must be a demand made

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made of his executors or administrators; and a request on non-payment is to be made, though the money becomes due before administration granted. *Lex Mercatoria*, cap. 6, 7. *Malyn's Advice* concerning *Bills of Exchange*, fol. 32.

6. The servant of a merchant cannot accept a *bill of exchange* for his master, without plain evidence that he hath authority to do it, or where the master usually allows the payment of bills accepted by his servant. *Lex Mercatoria* 265. 6 *Mod.* 56.

7. But another person may accept a bill for the honour of the drawer, and if he pays the money in default of the party, he is to make a protest with declaration, that he hath paid the same for the drawer's honour. *Lut.* 891.

8. When the first endorser signs the bill, the acceptor is no longer chargeable, unless one of the endorsers pays the bill to his endorsee, then he becomes entitled to sue the acceptor. 1 *Lut.* 885.

Fourthly, *Of the Person to whom the Money is payable, wherein is to be considered the Bearer or Endorser, and the Endorsement.*

1. A bill may be made payable to a person without any more, or to such a one, or bearer, or to such a one, or endorser.

2. If a bill of exchange be made payable to *A.* or bearer, and *A.* endorses it to *B.* *B.* cannot maintain an action against the drawer, for it is not assignable by the contract, but *B.* may maintain an action against *A.* for the effect of that endorsement is only to discharge the person upon whom it is drawn, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise. *Salk.* 25.

3. But though a bill payable to bearer thus endorsed, is not assignable to charge the drawer in the name of the endorsee; it is good to maintain an action at the suit of the person to whom it is thus endorsed against the endorser. *Salk.* 25. because the endorsement is in the nature of a new bill. *Hodges v. Steward*, 3 *Lev.* 299.

4. If a bill payable to *A.* or bearer, be bought at discount, it is an absolute purchase, if payable to order, and endorsed, the endorser warrants the whole bill. *Salk.* 128.

5. Where a bill is payable to *A.* or order, and *A.* endorses it to *B.* he cannot sue *A.* till he has endeavoured to find the drawer to demand it of him, and that must be set forth in the declaration. *Salk.* 126.

*6. If a bill is made payable to *A.* or order, and *A.* endorses it blank, and delivers it to *B.* this gives *B.* an election to receive it as servant, or as endorsee; but till the blank is filled up, the property remains in *A.* *Salk.* 126, P *314.

7. If

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7. If a *bill of exchange* is endorsed to another by an endorser, yet the endorser may bring an action upon this bill. *Show. 164.*

8. Between endorser and endorsee, the endorser must have notice of non-payment by the drawer, and a neglect in the endorsee, of not receiving the money in a convenient time, will excuse the endorser. *Salk. 132.*

9. And that convenient time to receive the money to charge the drawer or endorser, shall be guided and governed by the usage of merchants and traders, and the particular circumstances that occur. *Salk. 123.*

10. Yet when *A.* endorses and delivers a bill to *B.* who keeps it by him long after it is payable, if it is not paid, he may have an *assumpsit*; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. *Salk. 124.*

11. And the endorsement, delivery, and detainer are no evidence, that *B.* the endorsee accepted it as so much money; but if *A.* sells goods to *B.* and agrees to take a bill on *C.* in satisfaction, or if the servant of *A.* who is sent for the money takes a bill, and *A.* accepts it, and agrees to it, then *B.* is discharged, though it be never paid. *Salk. 442.*

12. An endorsee of part of a sum in a bill, cannot bring an action for part, without shewing the other part satisfied, because the action and contract are both entire; and if he could by this management, a man may have two actions against the drawer, when by law he can have but one, and that would work an injury to an innocent person; but the law is otherwise, and in that case he must acknowledge satisfaction for the residue, and that will do with respect to the drawer and endorser. *Salk. 65.*

13. If a man pays away a note of a third person to another, who takes it as absolute payment, yet if he that paid it away knew that the third person was breaking, and the person to whom the note was paid, uses all diligence to get payment, this shall be construed a fraud; but if a man takes a note, and neglects to go and receive it, and the party fails, the loss shall fall upon the neglect. *Mod. Cases 148. Popley v. Ashley.*

14. The endorsement of a *bill of exchange* is a writing, signifying that the property of that note is thereby transferred to the endorsee, and though an acceptance of a *bill of exchange* may be by parol, yet the transferring the legal property of the note must be by writing, and that writing must be significant, that the property is thereby transferred; and it was adjudged in the case of *Est and Essington*, reported in *Farresley 8.* that where the person, to whom the bill was made, endorsed upon the said bill the contents thereof, to be paid to the plaintiff, according to the custom of merchants; and in as much as there had been a verdict for the plaintiff, the jury could not have found for the plaintiff, without finding the indorsement, and to be a good one; and *Holt Ch. Just.* in that case said, that if
a man

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a man writes upon the back of a *bill of exchange*, this is to be paid to J. S. and sets his hand to it, that will be a good endorsement.

15. The last endorsee may bring an action against the last endorser, without suing the drawer, and the rest successively, for he hath his election to sue the one or the other. *Show.* 442.

Fifthly, Of the Protest.

1. This protest is a notice given by the person to whom a bill is payable, that the person upon whom it was drawn, refused to pay the money *therein contained; and after such protest, the drawer P *315. becomes liable to pay for the exchange, interest and all charges, damages and losses that may be sustained by such refusal; and it was originally used as a terror, to trading persons, that they might not draw bills when the person upon whom they are drawn had no effects in their hands; and when they had, it was a terror to them, that they might not fail in paying such bills so drawn; for by this protest, all persons were made acquainted that this was not a good bill at that time.

2. Before the statute of 9 W. 3. c. 17. if a bill was foreign, one could not resort to the drawer to charge him for non-acceptance, or non-payment, without a protest, and reasonable notice thereof; but in case of an inland *bill of exchange* it was otherwise; the protest was ordered for the benefit of the drawer, to give notice that the bill is not accepted.

3. *Bills of exchange* were found to be so convenient for the advancement and benefit of commerce, that the parliament thought fit by that statute to make inland bills of as much force and validity, and to have the same qualifications, as foreign *bills of exchange*; and therefore it was enacted, "That all bills of exchange, dated at, or
"from any place in England, of the sum of five pounds or upwards,
"upon any person in London, or other trading city, town or place,
"drawn payable at a certain time after the date thereof; and in
"which bills the value shall be expressed to be received, may after the
"acceptance thereof in writing, and the expiration of three days after
"the same shall be due, be protested by a notary public; or if there be
"none such by any other substantial person of the place before two witnesses, on a refusal or neglect thereof; which protest shall be made
"under a copy of the said bill, and shall be notified within fourteen
"day after to the party from whom the bills were received, who upon
"producing the said protest, is to repay the bills with interest and
"charges from the protesting; and in default of such protest, or notice
"to be given, as aforesaid, the person failing shall be liable to all
"costs, damages, and interest thereon."

" Provided,

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“ Provided, That if any such inland bills be lost, or miscarry within the time limited for payment of the same, the drawer of the said bills shall give other bills of the same tenor, security being given to indemnify him, in case the said bills so lost or miscarried be found again.”

This statute was thought not to have given a complete remedy, and a sufficient qualification to inland bills of exchange; so that afterwards by a statute of the 3 & 4 Annæ, cap. 9. it was enacted; “ That after the first day of May, 1705. in case the party on whom any inland bill of exchange shall be drawn, shall refuse to accept the same, by under-writing the same under his hand, the party to whom payable, shall cause such bill to be protested for non-acceptance, as in case of foreign bills, for which protest shall be paid two shillings and no more.”

Proviso, “ That no acceptance of such inland bill shall charge any person, unless under-written or endorsed; no drawer to pay costs, damages, or interest thereon, unless protest be made for non-acceptance, and within fourteen days after protest, the same be sent, or notice thereof given to the party, from whom such bill received, or left in writing at his usual place of abode.”

“ If such bill be accepted, and not paid within three days after due, then no drawer shall pay costs, damages, or interest thereon, unless protest be made and sent, or notice given as aforesaid; nevertheless the drawer shall be liable to payment of costs, damages and interest, if any one protest be made for non-acceptance, or non-payment, or notice be sent, given or left.”

P *316. Proviso, “ That no such protest shall be necessary, unless the value be expressed in such a bill to be received, and unless the bill be drawn for 20 l. or upwards, and protest be made for non-acceptance, by persons appointed; per 9 W. 3. cap. 17. “ See Trade in 9 W. 3. cap. 17.”

“ If any person accept such bill of exchange, in satisfaction of any former debt, the same shall be esteemed a full payment, if he doth not his endeavour to get the same accepted and paid, and make his protest as aforesaid, for non-acceptance, or non-payment.”

Proviso, “ That nothing herein shall discharge any remedy any person may have against the drawer, acceptor or endorser of such bill. *Abr. of the Stat.* 118.”

4. Where a bill is protested for non-acceptance, the drawer it is said must have notice of the protest. 2 Keb. 584. *Butler v. Play.*

5. If a bill is negotiated after it is due, it is payable at sight; and if it is payable at a certain day, and accepted, the protest must be at the day of payment; if payable at sight, it must be protested at the third day of grace. *Show.* 164.

6. In case of an inland bill of exchange, a protest was not necessary before the statute of 9 W. 3. cap. 17. and that statute does not take

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take away the plaintiff's action for want of a protest, only in case of a protest, the party drawing is liable to damages, interest and costs. *Salk.* 131.

7. Before that act of parliament, it was held in the case of *Butler v. Play*. That if a protest had been a fortnight after the refusal of payment of the bill, it was by law accounted a reasonable time. *1 Mod.* 27.

8. In case of necessity it was held, that a protest might be made on a copy of the bill. *Show.* 164.

For declarations and pleadings in this action, see hereafter in the titles declarations and pleadings in *assumpsit*.

Secondly, *By and against whom this Action on the Case on an Assumpsit is to be brought.*

1. *Who may bring the Action.*

1. It was adjudged that the husband and wife might bring the action for a cure performed by the wife during the coverture, and that the action would survive to her. *2 Cro.* 77.

2. If a promise be made to the wife during coverture, it was held in *1 Cro.* 61. that husband and wife might well bring the action. *Q. de hoc.*

3. He for whose advantage the promise is made, may bring the action notwithstanding the promise was actually made to a third person. *T. Jones* 103 *Dutton and his Wife v. Poole.*

4. Where a debt was due to a feme sole, who after being married, the defendant accounts with the husband; it was held that the husband and wife ought to have brought the action, because in all cases, so long as the first contract, or specialty, made to the wife while sole, continues, she shall be joined, in as much as if the wife dies, the husband cannot bring the action but as administrator to her. And this diversity was taken by the court, that where the husband and defendant accounted for money due to his wife, *dum sola*, and it was found that the defendant promised to pay him, and he brings the action; it is ill after a verdict; but where, in consideration the husband would forbear a suit, the defendant promises, and the husband brings an action upon that promise, there, in as much as it is a new contract, which changes the first by the forbearance, there the wife need not be joined. *1 Syd.* 299. *Tirrell v. Bennett.*

5. And in *Allen* 36. in the case of *Hilliard* and his wife against *Bambridge*, it was held, that upon a promise to husband and wife, it was in the election of the husband to bring the action with or without *his wife; and these cases were cited. *43 Ed.* 3. 10. *15 P* *317. *Ed.* 4. 10. c. — *7 Ed.* 4. 6 a 7. *Baron and Feme* 55.

6. The

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6. The defendant distrained the plaintiff's cattle, the defendant, in consideration of ten pounds paid to him by the two plaintiffs, promised, to procure the cattle to be delivered to them, and because they were not delivered, they brought this action; and *Roll* Chief Justice held the promise to be entire, as the consideration was. *Stile* 156, 203. *Vaux & Vaux v. Steward*.

7. A sale by joint-merchants to *B.* and *A.* one of the joint-merchants dies, the action survives, and the executor of *A.* need not be joined. 3 *Keb.* 798. *Hall v. Rougham*.

2. Against whom it may be brought.

1. It can't be brought against the husband on a supposed promise made by him, for the forbearance of suing for a debt due to the plaintiff by the testator, to whom his wife was executrix, and dead at the time of the promise. 2 *Cro.* 257. *Smith v. Johns*.

2. If an infant be bound in a bond, and in consideration the plaintiff would not sue him, he promised to pay; this will not make the action against the infant to be good. *Cro. Eliz.* 700. *Morning v. Knop*.

3. If I pay money in satisfaction of a duty, and he to whom it is paid, hath no title to receive it, and the duty is unsatisfied, I may have an action against him that received it. 2 *Syd.* 4. *Bonnell v. Foulke*.

4. The plaintiff brought an action, as principal of *Furnival's Inn*, upon an *Infimul computasset*, for money due to him, and the seniors of the society. Here it was agreed, that the church-wardens might bring an action in their name, for the debt of the parish, for they are a corporation; but here the principal and antients ought to have joined. And tho' the defendant be one of them, the promise is to all the rest, excluding himself; so if there be twenty partners, and one covenants with all the rest, he is in that respect separate from them, and they must all join in an action. *Thimblethorp v. Hardesty, Far.* 116.

5. As under the foregoing title, it was adjudged, that the husband shall join his wife in an action upon an *infimul computasset*, for a debt due to the wife when sole, so in the case of *Drue and Thorne*, in *Allen* 72. was it held, that if an action be brought against the defendant, only upon an *infimul computasset*, for a debt due by the defendant's wife when sole, that is ill, for the wife ought to be joined in the action.

6. It cannot be brought against an infant upon an *infimul computasset*, though the original contract were for necessaries. 2 *Roll's Rep.* 271. *Tirrell's Case*.

7. Where it has been held to lie against a servant, for goods bought for the master. *Dyer* 230. *Alford's Case*.

8. Where

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8. Where an infant is bound in a bond with a surety, and at his full age, promises the surety he will save him harmless; it is said in the case of *Stone and Withipole*, 1 *Leon*. 113. that an action may be brought against the infant upon that promise. And in the case of *Barton and Edmonds*, in 4 *Leon* 5. it is said in such case, where the infant died, that the action lies against his executors. *Tapper v. Davenant*, 3 *Keb*. 798.

9. It lies for a feme sole, who marries a man that was before married to a woman then alive, for money by him had and received from the tenants of the feme sole after their marriage; the reason of this is, because this second marriage was *ipso facto* void. 1 *Salk*. 28. *Haffer v. Wallis*.

10. Where a feme covert parted from her husband by consent, who allowed her a separate maintenance, and she came up from *Beverly* to *London*, and lived there four years, and was big with child, and an action being brought against the husband; upon this whole matter it was adjudged, that the husband was not liable. P *318. 6 *Mod*. 147. *Cragg v. Bowman*.

11. Where a woman married carries on a trade in *London* by herself, though in a garret, as a gimp-lace-maker, or a mantua-maker, and the husband never intermeddles therewith, she is construed a feme sole, and the husband is not chargeable for her debts; but if at any time he during her life intermeddled, he is. 1 *Show*. 183, 184, 185, *Fabian v. Plant*.

12. Where the husband had married two wives, and the second came up to town, to prosecute him, and was committed to the custody of the plaintiff a gaoler, by the husband's complaint, the husband shall not be chargeable to the gaoler for what he provides for her. 2 *Lev*. 16. *Calverly v. Plummer*.

13. Though an action will lie against an infant for necessaries, yet where the plaintiff declared for gold and silver-laced clothes, and for other necessaries; and the defendant pleads nonage, and the plaintiff replied they were for necessaries; upon a demurrer, the court looked upon the record, and saw that the defendant was there styled a gentleman; and adjudged, that such clothes were not fit for the degree of a gentleman, and gave judgment only for necessaries; and as the plaintiff had confessed part of the contract received, applied that part received to the necessaries, so that judgment was only for the remainder. *Gouldsb*. 168. *Mackerell v. Bachelor*.

14. An infant keeps a mercer's shop, and buys goods; the plaintiff brought an action for goods sold and delivered to him; the infant pleads nonage; the plaintiff replies, that they were for wearing apparel, and for the maintenance of his family. The defendant rejoins, that he kept a mercer's shop, and bought these wares to sell again; and traverses, that he bought them for necessary cloathing; and upon a demurrer there was judgment for the plaintiff, but that judgment reversed upon a writ of error upon this reason,

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reason, that the infant shall not be bound by his contract, though it be for the maintenance of his family and his trade.. 2 Cro. 494. *Whittingham v. Hill*.

15. It will lie against an infant for meat, drink, apparel and schooling. *W. Jones* 182. *Pickering v. Gunning*.

Thirdly, Of the Declaration.

1. Where a declaration was not good for want of shewing, that the plaintiff had not done all on his part, and how it ought to have been. *Cro. Eliz.* 292. *Gregory v. Newill*.

2. If one be indebted unto another upon a simple contract, and the plaintiff sues for it, upon a promise to pay it, he must shew how the first debt grew due, and for what; as upon an *indebitatus assumpsit*, where the debt is the consideration of the promise. *Woodford v. Deacon*. But upon an *in simul computasset* he need not shew how, and for what, but generally that the defendant *in simul computasset* with the plaintiff *de diversis denar' summis eidem Quer' per pred' Def. ante tempus ill' debet' Et solubil'*, and upon the account was found in arrear so much, and in consideration thereof, did promise, &c. without shewing for what. 2 Cro. 207.

3. If one sues upon a promise to satisfy him for work done, he must shew in his declaration how much he deserved for his work. *Ibidem*.

4. So if one sues for a thing sold, where no price was agreed upon, he must aver, and shew it to be worth so much.

5. Also where it is in consideration of forbearance, the cause of the first debt need not to be shewn; as if one sues for a debt, and the party, or another pray the plaintiff to forbear his suit, and he will pay it, &c. upon a suit upon this promise, the plaintiff need not shew the cause of *the debt he first sued for, for the forbearance is the consideration of this suit. 1 Syd. 396. 2 Cro. 548. *Austen v. Bewley*.

P *319.

6. Upon a special agreement to pay so much for him and his wife, for meat and drink, if they were there and received it, he must there aver they were there, and received it. 2 Syd. 6.

7. An action upon the case, for that whereas the defendant's cattle were impounded by A. B. that the defendant promised the plaintiff, that if he would deliver them out of the pound, that he would save him harmless from A. B. and then set forth that A. B. had brought a *parco fracto* against him, &c. after verdict for the plaintiff, the judgment was arrested, because the plaintiff did not aver that he did deliver the cattle, which was the point traversable. *Skinner* 141. *Anonymus, Mich.* 35 Car. 2.

8. If one promises to enter into bond for performance of articles, in an action upon this promise, the breach assigned was for not enter-
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ing into bond, without shewing for what sum the bond was to be by the agreement, it was held to be aided by the general issue. *Mod. Rep.* 70.

9. Upon a promise to give the plaintiff a horse, if he would make a lease for years to him, rendering rent, and alledged a lease for years, but did not say any rent was reserved; the declaration was held naught, not pursuing the agreement, though for the defendant's advantage. 3 *Bulst.* 36.

10. Upon a sale of wine, the vendor affirmed it the best wine in *England*, in an action upon this affirmative it ought to be averred, that there was as good or better wine in *England*. *Noy* 48.

11. For stopping a way to such a field good, without shewing what interest he has in the field, but for stopping a way to a close otherwise. *Lat.* 160.

12. In an action for money laid out, without shewing for what, not good. *Noy* 185. 2 *Cro.* 548.

13. In consideration the plaintiff would abate of his debt, the defendant promised to pay; the plaintiff must shew how he abated his debt, and it is not sufficient to say he abated so much. *Gould.* 156.

14. An action upon a promise to pay so much, if the plaintiff would not further prosecute such suit; it is sufficient to shew he did not prosecute such suit, without shewing a discharge. 1 *Leon.* 118.

15. Where one promises in the penalty of 100 l. to save the plaintiff harmless from any damage that shall happen by the escape of *A*, the averring *A*. escaped. and that the defendant had not saved harmless, is sufficient; but if it were to save harmless from the escape, or pay 100 l. it were not enough to aver he escaped, but that the defendant had not paid 100 l. 1 *Syd.* 447.

16. An *assumpsit*, in consideration the plaintiff would cure his daughter, the defendant promised to pay so much, without averring that he did cure his daughter, and in consideration that the plaintiff had cured his daughter, that he the defendant promised to pay so much; upon *non assumpsit* pleaded, and a verdict for the plaintiff, it was held good, for upon the whole record, it appears that the daughter was cured. 1 *Syd.* 428.

17. To return a horse by such a day, or pay so much, the plaintiff assigned his breach for not returning his horse by such a day, without saying he did not pay the money, after a verdict the declaration was held naught. 1 *Syd.* 440.

18. The plaintiff declares, that he was possessed of tickets for the payment of seamen's wages, and had an order from *A*. for payment, and the defendant an under-officer of *A*. promised that if the plaintiff would not trouble *A*. that he would pay the money; after a verdict it was held good, though it was not alledged that he had a title to the tickets. 1 *Syd.* 292.

*19. In *assumpsit*, whereas the plaintiff *sestasset* the defendant, he promised the plaintiff, that if he would abstain from his suit, and shew

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shew a certain account, he would pay, and the plaintiff averred the abstaining from the suit, and *ostendit quoddam computu' præd'*; and was held good, but without *præd'* it would have been naught, *Mod. Rep.* 284.

20. In *assumpsit quod cum* the defendant, in consideration the plaintiff had promised performance of such an act, he promised to do such an act, held good, and that the *quod cum* was a sufficient averment. *Har.* 2.

21. In *assumpsit* to pay the plaintiff as much as he deserved, if he would board the defendant as often, and as many times as the defendant pleased, and the plaintiff alledged, that he did board him at the day of the promise, and several other days and times afterwards; and the declaration was held good upon a special demurrer, though the plaintiff had not shewed what days, or to what day he boarded him. *Ray.* 2.

22. In *assumpsit*, the plaintiff declares that *A.* was indebted to him, and *B.* was receiver of *A.*'s rent, and he appointed *B.* to pay the plaintiff out of *A.*'s rent, and the plaintiff and *B.* accounted together, and found in arrear; and he promised to pay, if he would forbear a month after the rent-day, good, without averring he had any rent in his hands. *Ray.* 211.

23. In *assumpsit*, if the plaintiff would endeavour and labour, that *A.* should marry *B.* the defendant promised to pay &c. and the plaintiff averred that he *omnibus modis quibus poterit conatus est & elaboravit* to persuade him, and that the marriage took effect, held good. *Ray.* 400.

24. In an action for not paying money at the exchequer, it is necessary to alledge in what county the exchequer is. *Stile* 59.

25. If one promise to pay money out of the freight of a ship, in an action for non-payment, the plaintiff ought to aver what was due. *Stile* 220.

26. In an action upon an *assumpsit*, if the consideration be executory; as if one promises to do something to me, in consideration of something to be done before by me, to or for him, if I will sue him for that he is to do for me, I must aver, that I have done that which was first to be done by me, for till that be done I may not maintain an action upon the promise. *2 Cro.* 583. *Pain v. Bastwick.*

27. And where it is executory, and averred that it is executed, when indeed it is not, the defendant may shew it specially, and may take issue as well for not performing the consideration executory, as upon the promise; but if he pleads generally *non assumpsit*, he can call the performance of the consideration executory, and so it is upon a promise to do any thing upon condition.

28. And if a certain time and place was agreed on for doing the thing agreed on, must set it forth to be done accordingly.

29. As if one promise to me, that in consideration I will forbear my debt till such a day, he will pay me, &c. I must shew I did forbear;

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forbear; for if I sue it within the time, the *assumpsit* and action is gone.

30. Where a place was held necessary to be set forth, where the plaintiff lent the defendant the money. 2 Cro. 598. *Johns v. Bowen*.

31. Judgment reversed, because the plaintiff did not shew for what the defendant was indebted to him, but only generally in the sum of 40l. *Mayor v. Harle*. 2 Cro. 642.

32. An Attorney, in an action upon the case may declare for so much, due *pro opere*, &c. and give his soliciting in Evidence. *Skinner* 218. *Ambrosse v. Roe*.

33. *Assumpsit*, the plaintiff declares for money won at a game called *Hazard*, good, without a special promise. 2 Vent. 175.

34. The plaintiff declared, that he intended to remove such goods, and the defendant promised to see them forth-coming, after a verdict good, without shewing that the goods were his. *Vent*. 211.

*35. *Assumpsit*, by a carrier for bringing goods from *York* to *London*, is not sufficient that he brought the goods to *London*, without shewing into what parish and ward. 1 Syd. 178. P *321.

36. In a declaration upon a promise to save harmless from a suit, it is not necessary to set forth precisely how he was impleaded, but generally that he was impleaded in such a court, in such an action. 2 Cro. 10. *Foster and Clement*.

37. *Yelv*. 18. *Soprani and another* against *Skurro*. Where the defendant promised to build a wall, parcel of a messuage, during such a term, agreed to be demise by *Zanches* to *Welch*, but the declaration in charging the defendant with a breach of promise, does not shew that *Zanches* did demise the messuage; so that if he did not, it was impossible for the defendant to build it during the term, and declaration held ill.

38. Where the declaration was, that in consideration the plaintiff would deliver the defendant's cattle out of the pound, he promised to pay him, or save him harmless; and avers, that for the delivery thereof, an action was brought against him, and a recovery; this was held ill, for want of an averment that he did deliver them. 2 Sho. 329. *Well v. Thomson*.

39. Where the declaration was, that in consideration that the plaintiff would, at the request of the defendant, repair part of a house, the defendant promised to pay so much; and then the plaintiff alleges that he did repair it; but held insufficient, because he did not set forth the performance pursuant to the consideration, in saying he repaired it at the request of the defendant; but to repair a part of a house, and not particularizing what part, was held well enough.

40. The declaration was, that in consideration the plaintiff would deliver to the defendant's son, such wares as the son should desire, the defendant promised the plaintiff to pay for them; and then

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then avers that he did deliver certain wares to the son, and the defendant refused to pay for them. *Roll* Chief Justice held, that the acceptance of the wares is an actual desire; and it was not necessary precisely to set forth an actual desire. *Stile* 163. *Johnson v. Abington*.

41. Where the declaration set forth, that the defendant, in consideration that the plaintiff would let the defendant a booth in *Sturbridge* fair, the defendant promised to pay 10 l. and to pay the plaintiff for all such wine and hops as should be spent in the booth during the fair; the declaration was insufficient after a verdict, because the plaintiff had not alledged that he gave notice how much wine and hops he laid in during the fair; nor that he made a demand of the payment of any sum due, that the defendant might know how much he was to pay. *Stile* 172. *Harris v. Gibbons*.

42. Where the declaration was for goods sold and delivered, and a promise to pay so much as they should be reasonably worth, it was adjudged as good, as if it had been as much as they were reasonably worth. 3 *Mod.* 190. *Bowyer v. Lenthall*.

43. In consideration the plaintiff would pay the defendant 20 l. he promised to assure land by a reasonable assurance.

44. Where the declaration set forth, that the defendant at *Bristol* was indebted for goods sold and delivered, and then and there promised to pay, it is said to be held ill, because it was not said where the goods were sold and delivered. 1 *Show.* 395. *Crabb v. Bowdler*. 1 *Keb.* 679. *Inman v. Patie*. 1 *Keb.* 669. *Patil v. Kent*. 1 *Keb.* 513. *Dorrington v. Slipper*. 1 *Keb.* 500. *Peacock v. Burrell*. 1 *Keb.* 468. *Bowler v. Marshall*. 1 *Keb.* 419. *Anison v. Starke*. 1 *Keb.* 382. *Saunders v. Godfrey*.

45. Where the declaration had not set forth, that the defendant promised to pay, in arrest of judgment upon the writ of enquiry, that exception was disallowed; for the promise being alledged to be made to the plaintiff, and no other person being named in the declaration, it shall be intended to be made by the defendant. 1 *Lut.* 237, 8. *Remington v. Taylor*.

46. Where it was held, that upon mutual promises, performance need not be averred. 1 *Lev.* 87. *Anonymus*.

47. To declare for goods delivered to the defendant, and a promise to pay, is void for want of the word *sold*. 1 *Leon.* 157. *Anonymus*. *Noy* 59. *Harewood v. Hammond*. 2 *Keb.* 438. *Gatton v. Brown*.

48. In consideration of the delivery of possession of a house, &c. that the defendant promised to pay so much, the plaintiff need not shew any title to the house. *Ben.* 151.

49. In consideration the plaintiff would abate of his debt, the defendant promised to pay; the plaintiff must shew how he abated his debt, and it is not sufficient to say he abated so much. *Gouldsb.* 156.

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50. In *case* the plaintiff declared upon the defendant's being indebted to the plaintiff, and found in arrear so much, which the plaintiff had not paid, and without saying *assumpsit solvere*; *quare* if good. 1 *Syd.* 306.

51. In consideration that the plaintiff had procured *J. S.* to surrender such a house, *quod defend' solverit*, it was held ill for want of *assumpsit sup' se*, after a verdict. *Stile* 246. 2 *Roll's* 464: *Apres* 306. *Noy* 50. *Cro. Eliz.* 913. *Stile* 255, 28.

52. *Assumpsit* upon an agreement to pay 2 l. *per annum*, and the breach assigned was for two years, ending at such a day, which was two years and a day, yet the declaration is good. 1 *Syd.* 409.

53. Where the declaration set forth, that differences had arisen between the plaintiff and defendant, and they submitted to the award of *J. S.* who awarded, that the defendant should pay to the plaintiff 30 l. out of the estate of one *Woolley*; but held ill, because it did not shew whether the defendant was executor, administrator or trustee, or how chargeable out of that estate. 2 *Lev.* 235. *Adams v. Statham.*

54. Where the award mentions, that the party shall have sufficient notice of a thing to assign a breach for non-performance, you must shew what notice was given, that the court may judge of the sufficiency of it. 2 *Syd.* 67. *Anonymus.*

55. Where an averment of notice was held to be not necessary. *March* 108.

Of Declarations on Bills of Exchange, and Promissory Notes.

1. The custom of merchants concerning bills of exchange, is part of the common law, of which the judges will take notice *ex officio*; as it was resolved in the case of *Carter and Dowrish*; and therefore it is needless to set forth the custom specially in the declaration; for it is sufficient to say, that such a person, according to the usage and custom among merchants drew the bill. *Carthero* 270. *Williams v. Williams.*

2. And it was adjudged in the case of *Magadata v. Holt*, 1 *Shoto.* 317. that if the custom of merchants be recited, and be ill recited, and differs from the fact set forth, yet inasmuch as the setting it forth is surplusage, and the judges are obliged *ex officio* to take notice of the custom of merchants, the declaration will not be ill.

3. And where an action is brought upon the second bill of exchange, neither the first or third having been paid, it is not necessary by way of averment to alledge, that the first or third was not paid; for the allegation of the sum contained in the bill's not being paid is sufficient, and supplied the want of an averment.

4. So to say, the person upon whom it was drawn could not be found, was held sufficient, without shewing they made an enquiry after him.

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5. Nor is it necessary to lay an actual promise after the protest made, for the law raises a promise by implication. *Carthew* 510. *Starke v. Cheeseman*.

P *323. *6. Note; A man cannot declare upon a general *indebitatus assumpsit*, on a *bill of exchange*, for want of a consideration; for it is but an evidence of a promise to pay, and therefore he must declare upon the custom of merchants, or else upon a general *indebitatus assumpsit* against the drawer, for money received to his use. *Salk.* 125. Q. whether a promissory note, which is made as a *bill of exchange* by the statute, is good without value received.

7. A note for payment of 60 guineas when the defendant should marry *E. P.* the plaintiff cannot declare upon this note, as upon a *bill of exchange*. 4 *Mod.* 242, 244.

8. To declare upon a promissory note, *secundum usum mercatorum* is ill. 1 *Sulk.* 129.

9. Case upon a *bill of exchange* upon the custom of merchants, brought by the last indorsee against the last indorser; and good, without suing the drawer and the rest successively; for he hath his election to sue the one or the other. *Show.* 442.

10. If one declares on a *bill of exchange* against the acceptor, payable so many days after date, and shews the acceptance and promise was after the bill was due and payable; and to pay *secundum tenorem billæ præd.* the declaration is good, for the promise is to pay presently, & *secundum tenorem billæ* shall be rejected as repugnant. *Salk.* 127.

11. A declaration on a *bill of exchange* payable at two usances drawn at *Amsterdam*, is not good, without shewing what usances are. *Salk.* 131.

12. If a declaration on the first *bill of exchange* wants an averment, that the first and second are not paid, it is aided after a verdict. *Salk.* 130. 3 *Keb.* 645. *Smart v. Dean*.

13. Where a custom is laid generally *int' al personas usitat' & approbat'*, it is ill. 1 *Lut.* 895.

14. On a *bill of exchange*, where it was omitted, that the bill was drawn *secundum cons. mercatorum*, and yet held well. 1 *Lut.* 277.

15. An action for part on a *bill of exchange* held ill, the contract being entire, unless he shews how the other part was satisfied. *Salk.* 65.

16. *H.* draws a *bill of exchange* upon *P.* payable to *S.* who endorses it to *A.* who endorses it to *C.* *C.* brings his action against *H.* in bar of this action, and adjudged a good plea; for by suing of the drawer he has waved his liberty of suing *A.* and *S.* for if he may sue *S.* then he may *H.* and *H.* be doubly charged. *Skinner* 255.

17. The plaintiff declares upon a *bill of exchange* against the drawer, setting forth, that the plaintiff had paid the bill for the honour of the indorser, and the custom was laid generally for merchants

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chants and other persons, without saying trading and using commerce at *London*, or within this kingdom; and therefore upon a writ of error the judgment was reversed. *Lut.* 89. 2 *b.* *Fairley v. Roch.*

18. In a declaration upon a promissory note, it is sufficient to say the drawer made a note, and it shall be implied that he signed it. *Modern Cases in Law and Equity* 307. *Elliot v. Cowper*; though the act of parliament which bestows credit upon such notes, and a remedy to recover on them where there was none at law, enacts that all notes signed, &c.

19. Where an action was brought against the drawer of an inland bill of exchange for default of the endorser, and the declaration did not set forth notice to the drawer; it was held ill upon a writ of error after a verdict. *Mod. Cases in Law and Equity* 43. *Lawrence v. Jacob.*

20. Error assigned in the declaration, that it was not alledged that the plaintiff was a merchant at the time of drawing the bill, yet held well enough. 3 *Cro.* 301. *Barnaby v. Rigalt.* 2 *Cro.* 306. *Castle v. Taylor*, in *Eagechild's Case*, *Hetley* 167.

21. If a bill be accepted, there is no occasion to alledge a demand. *Stile* 370. *Anonymus.*

*22. It is not necessary to shew, that the person to whom the bill P * 324. is payable is a merchant, and of late since this case of *Chat and Edgar*, in 1 *Keb.* 636. it has been held, that the very drawing a bill upon another, makes them both merchants for this particular purpose.

23. Where in a declaration it was alledged that a bill was paid by *P. A.* and *L. A.* for the honour of the defendant; but it was not alledged to whom the money was paid; for it ought to have been precisely alledged to whom the money was paid to the last indorsee, because the custom is so alledged; that if any person or persons pay the bill to the last indorsee, for the honour of him to whom the bill was first payable, and who first endorsed the bill, that then he who undertook to pay the bill for the honour of the drawer, is liable to pay it to the first endorser, to whom the bill was first payable; and therefore the declaration ought strictly to have pursued the custom; but yet judgment was affirmed, and the reason was, because it was after a verdict which had found the *assumpsit*, which could not have been without proof that the money was duly paid. *Lut.* 899. *Levin v. Brunetti.*

Declarations in Assumpsit held ill for Want of a proper Averment.

1. Where the defendant was to deliver a parcel of gum then upon the seas, as soon as it came to the port of *London*, and that it should be as good as other gum mentioned in the declaration;

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breach assigned for not delivering good gum; the declaration was held ill for want of an averment, that the gum delivered was the same as was upon the seas, and that it came to the port of *London*; for if was another parcel, then it is not within the promise, and the declaration ought to have shewn, that the gum delivered was the same agreed to be delivered, and then to have shewn that it was not good gum according to the promise. 2 Cro. 235. *Weston v. Dyke*.

2. Where the defendant promised to take the plaintiff's son an apprentice, and find him meat, drink and apparel; it is no good assignment of the breach, to say the defendant did not find him with meat, drink and apparel, without averring the plaintiff put him apprentice. *Talkham v. Wrigg*. 2 Cro. 406.

3. Where *T. O.* had acknowledged himself to be indebted to the plaintiff in 10 l. for several trespasses which the plaintiff had agreed to accept of, and the defendant, in consideration the plaintiff would permit the said *T. O.* to carry out his goods, and acquit him of the 10 l. the defendant would pay it; the declaration was not good, by saying he did acquit him, and suffered him to carry out the goods; but he must shew how he acquitted him, for it must be by writing. *Lenerett v. Rivett*. 2 Cro 503.

4. In an action upon the case against an executor, upon a promise made by the testator to pay 20 l. at his death, the plaintiff need not aver that the testator did not pay it in his life-time. *Hardr*. 221. *Greenway v. Hornblow*.

5. In an action upon the case against *Lovering*, upon a promise made by him to the plaintiff to pay them 84 l. out of the freight of a ship; *Roll* Chief Justice, the plaintiff ought to have averred, that there were monies due for the freight of the ship; otherwise how can it be known whether the monies due can be paid out of them, and the judgment was arrested. *Stile* 120. *Chase and Jones v. Lovering*.

6. In consideration the plaintiff would pay the defendant 70 l. he promised to assure lands by such reasonable assurance, as by the plaintiff's counsel should be advised, who advised a feoffment, with a covenant to discharge and save harmless from all encumbrances; the breach not well assigned; for this was not an assurance within the promise. *Cotes v. Kindor*. 2 Cro. 571.

P *325. *In what Instances the Declaration was held good without an Averment, and where not, relating to

Muskett v. Cole, Cro. Eliz. 133. The delivery of bills and obligations.

Rigg v. Clarke, Cro. Eliz. 194. A horse lent and abused.

Hopkins v. Stapers. Delivery of Goods.

Yelv. 176. *Rock v. Rock*. A promise to go a journey.

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Lut. 224. *Stinton v. Yates.* Maintenance of an infant.

Hardr. 1, 2, 3. *Ernly and others v. Doddington.* A promise upon a horse-match.

Godb. 13. *Anonymus.* Ill upon a consideration of forbearance, does not aver, that in fact he did give a day of payment.

2 *Cro.* 235. *Weston v. Dyke.* No averment, that the goods delivered were agreeable to those in the consideration.

2 *Cro.* *Stainewid v. Leebek.* No averment, that the bond was discharged upon a promise to pay so much in discharge of a bond.

1 *Keb.* 669. *Baxter v. Jackson.* To the delivery of beer to the house of the defendant, and in consideration thereof the defendant warranted money due by J. S. to the plaintiff.

What declarations have been held insufficient, and what not, relating to

Cro. Eliz. 292. *Gregory v. Nevil.* Relinquishing rent.

352. *Pipe's Case.* A promise to save harmless.

561. *Rofs v. Moss.* A promise to discharge suits.

848. *Coulston v. Carr.* *Super se Assumpsit*, and does not say to whom.

859. *Clerk v. Palady.* Permission to enjoy lands.

Telwerton 76. *Raynay v. Alexander.* Buying of 15 tod of wool to be chosen by the plaintiff out of 17.

87. *Dorrington v. East.* A promise to make a lease on the plaintiff's procuring 6l. to be lent to the defendant.

184. *Smith v. Jones.* Forbearance.

49. *Allen v. Randall.* A promise to procure a sufficient man to be bound.

207. *Rofs v. Pie.* A promise to save harmless from a recognizance.

220. *Coveney v. Wooden.* A promise to save harmless from all losses by dwelling in such a house.

19. *Jennings v. Hatley.* Marriage.

39. *Heyford v. Reeve.* A promise to produce a sufficient record.

110. *Lord Mordant v. Walden.* A promise to pay money on sealing an indenture.

2 *Show.* 238. *Middleton and others v. Whitehead.* For money received to a bankrupt's use.

3 *Lev.* 335. *Noble v. Holhead.* Money received after the day of the promise.

Moor 854. *Babington v. Lambert.* Money received to the plaintiff's use.

1 *Roll's Rep.* 391. *Beckingham and another v. Vaughan.* For money delivered to the plaintiff's use.

Hard.

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Hard. 5. Barnehurst v. Calbott. Forbearance to sue a third person.

Hard. 221. Greenway v. Horneblow. A promise made by testator, and the action against the executor.

Noy 185. Dixon v. Williams. A promise for money laid out and expended.

P * 326. *1 Lev. 171. Armitage v. Dison.* Miscasting the sum amended.
** Hett. 106. } Holmes v. Chenie. An infimul computasset.*
113. }

Palm. 559. Besfich v. Coggil. A promise upon an *infimul computasset* for money by defendant, and for a legacy.

Hutton 27. Bigg v. Malin. — A promise by an administrator.

Popham 177. Goodwin v. Willoughby. *Infimul computasset* against Joan the wife of T. Willoughby, and shews not whether executor or administrator.

Hob. 69, 77. Austin v. Gervase. An *assumpsit* to give a bond, and the defendant to deliver a horse.

2 Brownl. 273. Anonymus. Goods delivered to the plaintiff in pawn, in consideration of delivery, a promise to pay the debt.

Godbolt 358. Randall v. Harvey. Consideration of relinquishing of a suit.

Godbolt 412. Payne v. Colledge. A promise to endeavour to cure of a disease.

Godbolt Totman v. Hopkins. A promise to deliver barley next harvest, and the time of the next harvest not set forth.

1 Roll's Rep. 382. White's Case. A promise to deliver all the corn, &c.

1 Roll's Rep. 58. Chappell v. Woodham. Omission to whom payment was to be made.

1 Roll's Rep. 173. Anonymus. A promise to provide necessaries for J. S.

Stile 27, 88. Bower v. Southwell. A promise to pay money for currants sold, and the plaintiff to discount.

Stile 62. Baker v. Edmonds. A promise to an assignee under a commission of bankrupt.

Stile 243. Child v. Guilar. A special verdict.

Stile 410. Dorman v. Snag. A promise of forbearance.

Stile 419. Bunnworth v. Gibbs. A promise to leave off a trade.

Stile 57. Funier v. Jeffry. Forbearance of a suit.

1 Leon. 123. Musket v. Cole. Where it was held sufficient, though not shewn that the defendant had such bonds when he promised to deliver all the bonds he had, &c.

Yelv. 176. Rock v. Rock. Insufficient for want of a proper averment, that the journey the plaintiff alledged was his next journey, because the defendant was to pay before his next journey.

Hob. 95. Bayle v. Gird. That the plaintiff would die sixty kerseys, and that he did die all amounting to fifty-nine; and held well enough,

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enough, and the damages were assessed *occasione detentionis debiti*; whereas it ought to have been *occasione non performance*.

1 Leon. 335. *Hoskins v. Struper*. Plaintiff sold defendant fish to be shipped from *Bristol* to *St. Snear*, and to bring back from thence goods to the value; he alledges he did so, but does not say whose goods they were he returned with; and held sufficient.

Popham 206. *Anonymus*. A promise to discharge a third person, plaintiff says he did discharge him, but does not shew how.

1 Ventr. 156. *Stone v. Waddington*. An action in the court of York, for goods sold and delivered, but does not say where; and therefore ill, and the judgment was upon a writ of error reversed.

2 Lev. 87. *Hanship v. Coater*, 1 Syd. 87. *Godfrey v. Saunders*.

1 Keb. 164. *Hanship v. Carter*.

Aderton v. Dunstar. 2 Cro. 247. The promise varying from the consideration in the sum, though but in a penny; for it is not possible to make an *assumpsit* to pay that which was not the bargain.

* *Buseby v. Hadderton*, 1 Bulst. 179. But where it appeared to be P * 327. the misprision of the clerk, as in casting up the sums *in toto se attingunt*, it was amended.

4 Leon. 122. *Herne v. Crowes*. That the plaintiff promised the defendant, that when he had bought furs, concerning which they had a communication, he should have such a quantity as he pleased at an equal price; and the defendant in consideration thereof, promised he would not speak to the merchants about them.

Where Declarations in Case upon Contract were held well after a Verdict. See more of this hereafter.

1. In an action upon the case upon an agreement, and breach assigned, that the defendant *non performavit agreementum prædictum*, upon which issue was joined; and upon a writ of error in the King's Bench, on the judgment in the Common Pleas, the judgment was affirmed; and it was said that it had been good upon a demurrer, much more after a verdict. *Knight v. Keech, Mich 4 W. & M. Rot. 60. Skinner 344.*

2. Where there is a concurrence necessary to the performance of a promise at such a day, and it is laid, that at that day the defendant did not do it; after a verdict it shall not be presumed he did it before, because it shall not be intended the plaintiff was there before. *Harmon v. Owden, Salk. 140.*

3. *Stile* 19. *Long v. Bennett*, the plaintiff declared, that the defendant would not deliver *an acre of wood* which he had sold, and held well after a verdict.

Fourthly,

Readings and Observations

Fourthly, *Of the Plea, Replication, Rejoinder, Issue, Traverse, &c.*

1. Where a concord executory in part was held no plea. *Rayne v. Orten, Cro. Eliz.* 306.

2. Where not guilty was held a good plea. *Corbyn v. Brown, Cro. Eliz.* 470.

3. Accord is a good plea to an *assumpsit*, given upon a mutual promise at the time of the *assumpsit*, otherwise not. *Jones Car.* 2. 165.

4. In an *assumpsit* an accord was pleaded, that the defendant was to do several things, and averred a performance of part, and a tender to perform the other part, was held bad. *Jones Car.* 2. 6.

5. Where a thing is pleaded by way of concord it is issuable; but if the concord is not executed by giving and receiving, it cannot be pleaded in bar to the action. Therefore the best way of pleading it, is by setting it forth, that the thing was given and received in full satisfaction, but both are traversable. *5 Mod.* 87.

6. Case on a promise to pay money, if he does not make it appear to be paid to *A.* it is no plea that he did make it appear to be paid, without shewing how; in an *assumpsit*, the defendant pleaded in bar an action of account depending for the same money, and held not good.

7. Where the defendant promised to appear to a recognizance at the assizes, it is no plea that he brought a *certiorari*, which was allowed; for he ought to have appeared, and procured his appearance to be recorded. *2 Cro.* 282. *Russe v. Pye, Yelv.* 207.

8. Where the substance of the defendant's plea was said to discharge the promise. *Yelv.* 23. *Shelbury v. Scotsford.*

P *328. 9. Where the plaintiff declared in an *indebitatus assumpsit*, and the defendant pleaded *causa actionis non accrevit infra sex annos*; the plaintiff replied, that the intestate to whom the promise was made died such *a day, and that no administration was granted till such a time; and then administration was committed to the wife, & sic causa actionis accrevit, &c. and concluded to the country; held ill for they ought to have concluded with an averment. *Curry and his wife administrators v. Stephens.* *4 Mod.* 376.

10. Where the plaintiff declared that upon a communication about buying 300 ewes, and 14 rams, the defendant affirmed, and warranted them to be sound, and were then worth nine pounds a score; breach, that at that time they were not so. The defendant pleaded, that the bargain was for ewes and rams then going to *Wildmore* in *Lincolnshire*, and were sound, and worth nine pounds per score, and that he might have sold them for that price; this was held no good plea, because the defendant had not answered the substance of the complaint, which was the warranty and promise; and besides, this being a transitory matter, he ought to have pleaded that

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that matter where the plaintiff had laid his action. *Redhead v Harper, Yelv. 114.*

11. Where the plaintiff declared, that in consideration *Anne*, then the plaintiff's wife, would marry one *Thomas Mason*, at the request of the defendant, the defendant promised, after the death of *Thomas Mason*, to pay to the said *Anne* 40 s. a year for her life, and shews, that thereupon she did marry the said *Mason*, and that he died, and that she married the plaintiff; the defendant pleads in bar a release by deed by *Thomas Mason*, during the marriage, whereby he released all actions, quarrels, controversies, claims and demands whatsoever. It was adjudged, that this release did not discharge the promise, because, although the promise was present, yet the performance of it was future. But if the release had been by express words of all actions and quarrels, &c. which he or his wife might have, then the promise had been released. *Yelv. 156. Belcher v. Hudson.*

12. Where the defendant pleads nonage to an action for clothes, it is incumbent upon the plaintiff to reply they were for necessaries. *Palmer 361. Cheve v. Chester.*

13. A recovery in *assumpsit*, it is no bar to an action of debt upon a bond. *Owen 109.*

14. To an action upon an *assumpsit*, it is a good plea for the defendant to say that such a day before the breach, the plaintiff discharged him from the performance of the promise, without shewing how. *3 Cro. 384. 2 Cro. 620. 2 Leon. 215.*

15. The defendant pleads infancy to an action upon an *in simul computasset*, where the original contract was for necessaries, and held a good plea, for the infant may be mistaken in the account; and upon the trial, evidence is not to be given of the value of things, but only upon the account itself. *Latch 169. Wood v. Witherick.*

16. To a declaration in *assumpsit*, upon a contract to pay so much at a day to come, and the plea was, that the plaintiff discharged him of the promise, and does not shew how, and held not good. *1 Roll's Rep. 43, 44. Blackhead v. Cock.*

17. To plead to an action of *assumpsit*, for non-payment of money upon an award it is no plea, that the defendant was always ready to pay, without bringing the money into court. *1 Lut. 283.*

18. How to plead a letter of composition. *Vide 1 Lut. 271. In the Case of Trippet v. Naylor.*

19. To plead a recovery in a former action, in a court that had no jurisdiction of the cause, was held ill. *3 Lev. 234. Mico v. Morris.*

20. In pleading a recovery below in an inferior court, and varying in the sum, yet it is well enough, with an averment that it was the same cause of action. *3 Keb. 263. Symons v. Willoughby.*

21. In pleading a promise discharged before the time of performance, in the case of *Williams v. Benson*. *3 Keb. 211.* was held well enough, without shewing how. P * 329.

22. If

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*21. In pleading a promise discharged before the time of performance, in the case of *Williams v. Benson*. *3 Keb. 211.* was held well enough, without shewing how. P *329.

22. If

Readings and Observations

22. If a man declares for money payable at several days, and mistook his case, and it was against him upon a verdict, yet that judgment shall be no bar to a new action laying the money to be payable upon request, no more than if a man declares upon a promise founded upon two considerations, and so *vice versa*; and it is found against him; that shall not be pleaded in bar to a new action.
1 *Roll's Rep.* 391. *Paine v. Selle.*

23. A verdict in case for goods sold and delivered for the defendant, is no bar to an action of trover for the same goods. 2. *Lev.* 37.

What Pleas in Assumpsit have been held good, and what not good, for want of sufficient certainty, or otherwise, relating to

Woolman v. Tye, Cro. Eliz. 179. Matter waved by the insufficiency of a plea.

Cro. Eliz. 476. *Thornton v. Kemp.* Forbearance.

543. *Gower v. Capper.* The delivery of a bill.

2 *Cro.* 690. *Holms v. Fostwood.* Payment to a third person.

2 *Keb.* 353. *Ludleham. v. Stacy.* Tender, and being always and yet ready to pay.

550. *Bucknall v. Swinnicke.* By way of accord.

3 *Keb.* 312. *Ravenscroft v. Fonk.* Plea amounting to the general issue.

397. *Alderson and Desely v. Miller.* Pleading a release.

1 *Ventris* 252. *Anonymous.* A plea of tender.

1 *Lutt.* 227. *Johnson and his wife v. Mapletost.* The like.

2. *Mod.* 311. *Parrington v. Lee.* } The statute of limitations to
71. *Crozier v. Tomlinson.* } an *in simul computasset.*

1 *Mod.* 7. *Bucknall v. Swinnock.* A Plea amounting to the general issue.

2 *Saunders* 424. *Webber v. Tirill.* The statute of limitations to an *in simul computasset.*

1 *Syd.* 465. *Martin v. Delbo.* The like.

1 *Keb.* 235. *Brown v. Martin.* } A plea amounting to the general
228. *Hudson v. Bryan.* } issue.

3. *Keb.* *Browning v. Denham.* An accord.

W. Jones 146. *Vere v. Delavall.* Infancy with a traverse of the *Assumpsit.*

Hetley 138, 139. *Bill v. Lake.* } Where the statute of limitations
85. *Holford v. Gibbes.* } shall be a bar, and where not, and
when to plead it, and when not.

1 *Bulstr.* 39. *Dale v. Copping.* Infancy pleaded to an action for a cure.

1. In an action upon the case, upon a promise to do a thing upon request, the defendant pleaded a request on the 1st day of May, in such

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such a year, and the statute of limitations; the plaintiff replies no request as the defendant had alledged; which tantamounts to *modo & forma*, and upon this issue there was a verdict for the plaintiff; and it was held that the replication was good; for to say as the defendant had alledged, does not conclude the day, or any circumstance, but the substance of the plea; if it did, it would then be only an immaterial issue, which is helped by the verdict. *Hard.*
40.

2. In an action for surcharging of common, the defendant pleads a license from the lord; he ought to shew that there was sufficient common left for the commoners, or else the license is not good.
2. Mod. 6.

*3. If a bill of exchange be payable to *A.* for the use of *B.* it is no plea after *A.* hath indorsed this bill, and paid it away, for the drawer to say that *B.* was an officer in the excise, and indebted to the King, and that upon an exchequer process, the money contained in the bill was extended in his hands; for *B.* had only an equitable interest in the bill; *A.* to whom the note was payable had the legal interest, and by his indorsement over for *value received*, that value received was for the use of *B.* and the indorsement over vests the property of the bill, and the money therein contained in indorsee. *Carthew v. Evans v. Cramington.* P *330.

4. Infancy pleaded in bar to an action upon a bill of exchange, was held a good plea.

5. Interest of a bill of exchange, commences from the demand; if no demand till the action brought, the defendant may plead a tender, and that he is yet ready. *Mod. Cases 138.*

6. Where a bill is indorsed by *A.* to *B.* for goods sold by *B.* and *B.* keeps it by him long after payable, by which it becomes not a good bill, yet *A.* shall not plead in bar this bill given in discharge of the debt; for a bill shall never be a discharge of a debt precedent, unless it is part of the contract that it should be so. *Salk. 124, 442.*

7. If the defendant pleads *non assumpsit infra sex annos*, or *plene administravit*, the plaintiff need not shew the original. *Show.*
272.

8. Where the defendant loses 85l. to one man, and 40l. to another, and give notes for the money, the defendant cannot plead the gaming act, by which all securities are void for money lost, where the sum lost amounts to more than 100l. *5 Mod. 351. Stanhope v. Smith.*

9. Where a bill was payable three months after date, and the defendant pleads that such a day the bill was exhibited, and that *non assumpsit infra sex annos* before, and upon a general demurrer it is said to be ill, for it ought to have been, that the cause of action did not accrue within six years. *2 Keb. 874. Buckler v. Moor.*

Traverse.

Readings and Observations

Traverse.

1. Where a traverse to a plea of a concord was held good. *Moor* 428. *Benham v. Springe.*

2. *Cro. Eliz.* 407. The same case reported by the name of *Bateman v. Springe.*

3. A beaver hat pleaded in satisfaction to a *quantum meruit*, the plaintiff by protestation replies, that he did not give it in satisfaction, and traverses that he received it in satisfaction, and upon a demurrer the traverse was held good. *Young v. Rudd*, 5 *Mod.* 86.

4. If an action upon the case be brought, in which damages shall be recovered *pro tanto*, the defendant cannot make part of the tort an inducement to a traverse of the whole. 1 *Bulstr.* 116.

5. In an action for service from such a time, to such a time, the defendant pleads, that part of the time he served, and was paid, and traverses that he served to such a day, in such manner and form, &c. this is an ill traverse; by this traverse he hath put part of the time in issue, and hath concluded the plaintiff from saying he had no such recompence, in that it was too little; and therefore the defendant cannot make a part of the time of the plaintiff's service for an inducement to traverse the other. 1 *Saund.* 268, 269. *Osborn v. Rogers. Yelv.* 225.

6. The defendant pleads an award of three things, the plaintiff cannot reply an award of three things, and another; but must set forth an award of four, and traverse award of three. *Plowd. Com.* 95. *Lutt.* 329.

P * 331.

* 7. The plaintiff brings an action, and declares that he delivered a bond to the defendant, to be delivered upon request, and that he tore it in pieces; the defendant pleads that he delivered to him to be cancelled, *Qu.* if he ought to traverse the delivery to redeliver. 1 *Roll's Rep.* 395.

8. Where the defendant granted to the plaintiff one thousand trees in such a wood, to be cut within three years; and after they agreed, when the plaintiff had cut some of the trees, that if the defendant would cut no more during the three years, that after the three years, he should cut so many as to make up his thousand; and then the plaintiff declares, that at the time of the promise he had cut eight hundred only; and then shews, that after the three years, the defendant hindered the plaintiff from cutting the residue. The defendant pleads, that at the time of making the promise, the plaintiff had cut his thousand trees *absque hoc*, that at that time he had cut only eight hundred as he alledged, and by the whole court this traverse was held good; for the plaintiff, by alledging that he had cut only eight hundred, gave the defendant an advantage to deny that matter, and put it in issue; and by the plaintiff's demurring

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ring to the plea, he has confessed the cutting of 1000 trees, which was his full bargain, and consequently had no action. *Talam and Poulter v. Perient. Yelv. 195.*

9. Where an action was brought against an infant for necessities, who pleads infancy, and the plaintiff replies, that part of the goods sold and delivered were for necessary clothes, and the rest for necessary meat and drink; held an ill replication, because he ought to have shewn to which of the promises he applied the goods for apperal, and to which the other necessities; and it was resembled to the case of *Thwaite v. Spence*, upon an *indebitatus assumpsit*, and a *quantum meruit*, and the defendant pleads to all the damages but 4*l.* *non assumpsit*, and to the 4*l.* a tender; and it was adjudged ill, because he had not distinguished to which promise the tender was applied. 1 *Lutt. 241, 242. Swinburn v. Ogle.*

What held traversable, and what not, relating to

Cro. Eliz. 201. Smith v. Hitchcock. A promise to give a bond.
250. *Anonymus. Service.*

Yelv. 171. Dalby v. Cook. A promise upon an account stated.

1 *Leon. 154. Jennings and Winche's case.* Plea of a bond in satisfaction without a traverse.

1 *Cro. 250. Anonymus.* Where the consideration was held traversable.

What Replications in Case on Assumpsits have been good, and what not, relating to.

Ellis v. Ellis, 5 Mod. 368. A plea by an infant.

Lutt. 242. Swinburne v. Ogle. A plea of Tender.

3. *Lev. 57. Lemun v. Tooke.* To a plea by an administrator.

Fifthly, *Of the Trial, Evidence and Damages.*

1. Where the jury find a *verdict* upon another consideration, than is in the declaration, it was adjudged, that the plaintiff shall take nothing by his bill. *Moor 470. Revera v. Baptista.*

2. So in the case of *King v. Robinson. Cro. Eliz. 79.* Where the jury find, that the defendant promised, in consideration of the plaintiff's doing that in the declaration, and somewhat besides, he fails in all.

*3. Where the plaintiff declared of an absolute promise, and the jury found a conditional one, the judgment was arrested. *Cro. Eliz. 149. Mustard v. Hopper.* P *332.

4. What was held a mis-trial by the mis-awarding the *Venire.*
1 *Cro. 171. Johnson v. Tucke.*

5. Where

Readings and Observations

5. Where it was ill, for that the *jury* found less than the plaintiff declared in the *indebitatus assumpsit*. *Bagnal v. Sacheverell*, Cro. Eliz. 292.

6. Where the *jury* found the *damages* by reason of the promise, and not by reason of breaking the promise, and held ill *Harrison v. Newell*, Cro. Eliz. 781.

7. Where a breach is assigned in two things, one whereof is not any foundation for the breach of the *assumpsit*, and entire *damages* given, the judgment shall be for the defendant.

8. Where the *jury* find another *assumpsit*, than that the plaintiff declared upon, it is ill. *Munday v. Martin*; Cro. Eliz. 66.

9. Where *damages* are given for breach of an award, that is good in part, and void in part, the *damages* shall be supposed to have been given for that part only which is good. *Yelw. 55. Huys v. Wright, Stile 111. Pragnell v. Goff.*

10. Where the action was against an executor, and the *jury* found that the testator did promise *modo & forma*, but that he died such a day, which was before the promise supposed to be made; it was adjudged to be *surplusage*, and that it would not vitiate. 3 Cro. 103. *Inkerfalls v. Lamms.*

11. In *assumpsit* for wages and money lent, on *non assumpsit*, the defendant proved she was married and her husband alive in France; the *jury* found for the plaintiff; upon which she moved for a new trial, alledging the *verdict* was against evidence; but denied; for it shall be intended she was divorced; besides, as the husband is an alien enemy, she shall be chargeable as a feme sole. *Salk. 116. Deerly v. the Ducheſs of Mazarine.*

12. Where the declaration was for money received by the defendant of another, to the use of the defendant; as this might be for money lent, which the defendant received of the third person to his own use, for which he was to make it good to the plaintiff, the court will presume that after a *verdict*, and that it appeared so to the *jury* on the trial; for where a declaration will bear two constructions, and one will make it good, and the other bad, the court after a *verdict* will take it in the better sense. 1 Mod. 42. *Nofworthy v. Wyldman.*

13. If a note be brought to the person upon whom it is drawn for acceptance, and he keeps it, A. to whom the note was payable may produce T. S. to whom he had indorsed it with a blank indorsement, as an evidence in an action of trover against the acceptor. *Salk. 130.*

14. Where an action is brought by the indorsee against the endorſor, the plaintiff need not bring evidence to prove the drawer's hand, but he must prove a demand of money of the drawer, or that he could not find him. 1 *Salk. 127.*

15. A bill of exchange drawn at Bristol upon one in London, it was held that the *venire* may be in either county. 2 *Salk. 669.*

How

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How far a Verdict will aid an insufficient Declaration.

1. Where the plaintiff claimed a title to certain goods in the custody of S. P. and claimed them to be his own, and intended to remove them; and the defendant, in consideration he would suffer them to continue, promised to see them forth coming; after a verdict for the plaintiff for imbeziling them, the property of the goods shall be intended to be in the plaintiff, otherwise the jury would not have found a verdict. 1 Ven. 212. *Evans's case*.

*2. Where an action was brought upon an award, and it was awarded that the plaintiff should pay the defendant 10l. and the defendant should enter into a bond of 40l. for quiet enjoyment, after a verdict, the general averment of performance of the award shall be sufficient, though it be a condition precedent. *Vivian v. Shipping*, 3 Cro. 385. P *333.

3. Where the declaration was, that the defendant was indebted to the plaintiff for money lent to him, he *super se assumpsit*; and another count that *cumq; etiam* that the plaintiff had found horse-meat for J. S. *super se assumpsit*, yet this after a verdict upon a writ of error was held well; because, it was the defendant at first *Indebitatus fuit*, &c. *super se assumpsit*, the same nominative case shall be carried by intendment into the second promise. *Salk. 663. Rex and Gate-House*.

4. Where one of the promises was for money laid out for the use of the plaintiff, but does not say at his request, it shall be intended after a verdict. 3 Lev. 366. *Oliverson v. Wood*.

5. In an *assumpsit* for medicines, and for labour, in curing the defendant's daughter; after a verdict, a cure shall be intended. 1 Lev. 280. *Lee v. Edwards*.

6. Where the action was brought against the executor, upon a promise of the testator, and the defendant pleaded *non assumpsit*, but does not say, that he, or the testator *assumpsit*, it shall be intended, after a verdict, that the testator promised. 1 Lev. 184. *Browning v. Litton*.

7. Where the declaration was *pro opere suo facto*, without saying what, or whether for the plaintiff; held well after a verdict. 1 Syd. 425. *Russell v. Collins*.

8. *Assumpsit* for necessities, the defendant pleads *nonage*, the plaintiff replies, that it was necessities for the defendant suitable to his estate, and concludes to the country; held well after a verdict. 1 Syd. 341. *Burton v. Chapman*.

9. Goods sold and delivered to the defendant's father, and does not say at the plaintiff's request; it shall be intended after a verdict. 3 Keb. 756. *Kent v. Deanbeney*, *Hill v. Tilly*, 3 Keb. 642.

10. To an action grounded upon an *assumpsit*, the defendant may plead

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plead the *general issue*, and give the statute of gaming in *evidence*. *Skinner* 195. *anonymus*.

11. Where an action is brought on a special agreement contained in a note, and that is the only *evidence*, the court denied a copy to the defendant. *Hill v. Aland, Salk.* 215.

12. If it be necessary in any place to alledge a request at a certain day, which is done accordingly, the plaintiff may give in *evidence* a request at any other time, than that which is alledged in the declaration. 1 *Syd.* 268.

13. In *assumpsit* evidence was given, that the debt was attached by the custom of *London*, before the action brought, and that *condemnation* had there been before plea pleaded; and it was argued, that this would defeat the action; but it was *adjudged*, that if an *attachment* and *condemnation* be before the writ sued out, it may be given in evidence on *non assumpsit*, because it is an alteration of the property before the action brought; but as the *attachment* only was before the writ purchased, it ought to be pleaded in abatement. 1 *Salk.* 280. *Brook v. Smith.*

14. On a *mutuatus* for 10*l.* lent, providing 8*l.* lent is not sufficient, but on an *infinimul computasset*, that part was borrowed at one time, and part at another, it is good *evidence*. *Show.* 215.

15. Upon an *indebitatus assumpsit*, matters of account cannot be given in *evidence*. *Mod. Rep.* 270.

16. In an *assumpsit* for goods sold, the defendant in mitigation of damages may give in *evidence* an eviction of the goods. *Vent.* 167.

17. Upon *non assumpsit*, infancy may be given in *evidence*, but not upon *non est factum*. *Ven.* 170.

P * 334. 18. Where there was an *assumpsit* to pay money on request, if another did not, on *non assumpsit* pleaded, the plaintiff need not prove a request. 1 *Lew.* 166.

19. Upon a promise to pay so much upon the marriage of his daughter, upon *non assumpsit*, the defendant cannot give in *evidence* a discharge of the contract, but in mitigation of damages he may. 2 *Lov.* 81.

20. Upon *non assumpsit* if it were an *assumpsit* in fact, a release or performance cannot be given in *evidence*, but in mitigation of damages; but in the case of an *assumpsit* in law, they may be given in *evidence* before the action brought. 1 *Syd.* 236, 53. *Beckford v. Clarke.*

21. An *assumpsit* by the husband alone, for money received to the plaintiff's use the money was due to the plaintiff's wife as executrix, and paid to the defendant as due to her, without the plaintiff's knowledge. It is no evidence to maintain the action; but if it had been paid by the order of the plaintiff, it is. *Salk.* 282.

22. Where a man receives money by the appointment of an administrator, and the administration is repealed, an *indebitatus assumpsit* lies against the person that receives it; because as he received it by

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by the appointment of a person that had no power to make such appointment, it was received as without an authority. *Jacob v. Allen. Salk. 27.*

23. *Evidence*, that the plaintiff's wife and the defendant accounted; and it appeared that the defendant had borrowed 8l. at different times of the plaintiff's wife; it was held good proof of an *infirmul computasset*. 1 *Show. 215. Styart v. Rowland.*

24. Where *non assumpsit infra sex annos*, before the time of suing out the original, is pleaded, and the plaintiff replies, that the defendant did promise within six years before the suing out the said original; so the same on *plene administravit*, where the date is mentioned on the record; there you need not shew it in *evidence*. *Edwards v. Thompson. 1 Show. 272.*

25. It is said in *Show. 301.* in the case of *Hartup and Wardlove*, to have been held by Mr. Justice Jones, that an *indebitatus assumpsit* lies not against a man, where he hath received money of the plaintiff, to lay out to a particular use, and he hath laid out part thereof accordingly, for that then he ought to be called to an account for the same by an action of account; but if none were laid out, there an *indebitatus assumpsit* lies to recover the money back again; so if it were expended to another purpose, for there the sum is certain, and may be demanded as a debt. 2 *Show. 301.*

26. Infancy may be given in *evidence* on *non assumpsit*. *Salk. 179. Darby v. Boucher.*

27. The plaintiff as executor, brought an *indebitatus assumpsit*, for money of the testator received after his death to the plaintiff's use, and produced the testator's debtor, who paid it as witness; but he was rejected; for by *Holt Ch. Just.* The plaintiff by bringing this action, determines the election he had of suing the original debtor, or the receiver, and allows of the payment; but if he be non-suited, the matter is at large again, and he may sue the debtor; and therefore the debtor swears to discharge himself, and by consequence is no witness. 6 *Mod. 151. Clerk. v. Dealy.*

28. 3. *Lev. 152. Rescous v. Williams*, adjudged that a witness who had laid a wager, where the action was upon money won at fencing, shall be admitted as an *evidence*, and it shall only go to his credit.

29. Upon *non assumpsit infra sex annos* pleaded by the executor, a promise by the executor himself cannot be given in *evidence* upon that plea. *Salk. 28. Dean v. Crane.*

30. By a demurrer, to *evidence* all matters of fact that may lie in the knowledge of the jury are confessed; as where in an inferior jurisdiction, an arrest was to be produced as *evidence*, and they proved the arrest by virtue of the King's writ by a matter of fact, which ought to have been by matter of record, for the writ ought to have been produced to prove itself; but as there was a demurrer to *evidence*, after a verdict, it shall be intended that the jury knew of the writ. 1 *Lev. 87. Fitzharris v. Boiun.*

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31. The defendant pleads *payment* to one promise, and the *general issue* to another, and the *jury* find as to both *non assumpsit*. It appearing that the *jury* found both issues for the defendant, that shall be taken to be a misprision of the associate, and it was ordered to be amended, and the plaintiff had judgment. 1 Cro. 149. *Reyle v. Bagshaw*.

32. Where the promise was to pay the value of such goods as were of J. S. and his partners, and issue thereupon, the *verdict* was found for the plaintiff, *Finch* for the defendant moved for a *repleader*; which by *Twisden* cannot well be, but rather a *venire facias de novo*, 1 Keb. 289. and afterwards *Twisden* said, as the *jury* had found a matter impertinent, the court would not grant a *repleader*. 1 Keb. 291. S. C.

33. What was held an *erroneous issue*. *Noy* 114. *Bradley v. Denney*.

34. What was held a *mis-trial* in *assumpsit*. 1 Brownl. 7. *Chimera v. Cod*.

35. Where *not guilty* has been held a good issue in *assumpsit*. 1 Bro. 8. *Glover v. Taylor*.

36. An attorney in an action upon the case, may declare for so much due for work and labour, and give his soliciting in evidence. *Skinner* 218. *Ambrose v. Rose*.

Damages.

1. Wherever the *damages* upon an *assumpsit* are increased by the court in an *assumpsit*, as well as in any other action, they must be laid to be increased *ex assensu partium*, or at the instance of the plaintiff; and for want of it the judgment was reversed. *Palmer* 148. *Couflade v. Ayres*.

2. Where the *jury* give *damages* generally, and part of the things supposed to be found or provided by the plaintiff for the defendant, are such as he ought not to have had any action for; the *damages* shall be supposed to have been given for that part, for which an action would lie. 2 Roll's Rep. 79. *Anonymus*. 1 Leon. 145. *Anonymus*.

3. If an action upon the case be brought upon two promises, and both are found for the plaintiff, the *jury*, may give *entire damages* for both; for this is at the peril of the plaintiff; for if the action does not lie for either one of them, the plaintiff shall not have judgment for the other, but it is not any inconvenience of the other part, if the action lies for both. *Mich.* 14. *Jac. B. R. Payne and Selby* adjudged. 1 Roll's Abr. f. 570. Letter R. pl. 1.

4. Where *general damages* shall be intended for the whole charge in the declaration, 10 Co. 132. so in other actions upon the case. *Moor* 707. pl. 987. *Cro. Eliz.* 560, 866. *Hob.* 189. 10 Co. 130. *Moor* 281—so in debt, 1 Brownl. 70.—so in trespass. *Stile* 174.

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175, 182, 399. 3 *Leon.* 213. *Cro. Car.* 21. *Godb.* 57.—so in covenant. *Cro. Eliz.* 685. *Cro. Jaci* 439. 1 *Sand.* 155.—and for this, *vid.* 5 *Co.* 108. 10 *Co.* 130, 131. 3 *Bulst.* 131. *Helt.* 51, 53. *Lit. Rep.* 61. *Stile* 198. *Cro. Eliz.* 59, 560. *Cro. Jac.* 239. 1 *Syd.* 38. *Moor* 281—so where the plaintiff alledges two breaches of an award, one of which is sufficient, and entire damages are given. *Bedel and Moor*, 1 *Leon.* 170 adjudged 5 *Co.* 108. cited, *vid. Yelv.* 35. where entire damages shall hinder plaintiff's judgment. *Vid.* 2. *Roll's Abr.* 99. letter E. and the notes there, 1 *Roll's Rep.* 423. 3 *Bulst.* 258. S. C. the judgment being given upon demurrer, and entire damages assessed upon a writ of enquiry.

5. In an action upon the case upon a promise, if the plaintiff declares, that whereas the defendant was possessed of a shop in B. and of * several goods and chattels in the said shop, in which shop the defendant *adunc exercuit* the art or mystery of a grocer; the defendant, in consideration the plaintiff would marry C. the daughter of the defendant, promised to pay so much money for her portion, and so much for apparel, and that she would transfer, or turn over to the plaintiff her trade in B. aforesaid, and the said shop of the defendant there, and so much of the goods and chattels of the defendant in the said shop, which should be worth ten pounds; and that she would not at any time after exercise her said trade in B. aforesaid, and that she would lend to the plaintiff ten pounds, till a certain time; and the plaintiff assigns a breach in all, and, among other things, that she did not turn over to the plaintiff her said trade at B. nor the shop aforesaid; and all found for the plaintiff, and entire damages given; and though it is impossible to assign her trade, yet it shall be intended, (if it be void and impossible, and signifies nothing, and is of no sense or meaning) that the jury did not give any damage for it; *Trin. Car. B. R.* between *Grosse* and *Pragnell*, adjudged in a writ of error upon a judgment *in banco*, and the judgment affirmed. *Intratur P. 24 Car. Rot.* 217. *Stile* 111. *Allen* 67. 1 *Roll's Abr. f.* 577. pl. 5. P * 336.

6. In an action upon the case, if the plaintiff declares, that whereas the defendant had bargained and sold 40 tun of currants, at the rate of 46s. 8d. for every hundred weight to be delivered to the plaintiff, within three months then next ensuing *discomputando ex eodem pretio pro quatuor mensibus*; the defendant, in consideration the plaintiff had then paid to him in hand 400l. in part of payment, and promised to pay the residue to be due, *discomputando ut praesertur*, for the currants, upon the delivery of the currants to the plaintiff; the defendant in consideration inde, promised to deliver to the plaintiff, the currants within three months then next ensuing, and assigns a breach for the non-delivery of the currants, at the end of three months according to the promise; and upon *not guilty* pleaded, a verdict is found for the plaintiff, and Damages assessed generally; and

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and tho' it was objected, that it is not known what is intended by the words in the bargain to pay 46s. 8d. for every 100lb. *discom-putandum ex pretio pro quatuor mensibus*; yet although the court does not know what is intended thereby, then it shall be intended by the court, that the jury did not give any damages for it. *Mich. 23 Car. B. R. between Brewer and Southwood. Adjudged per Curiam; Intratur Hill. 22 Car. Rot. 1372. 1 Roll's Abr. 577. pl. 6.*

7. If the plaintiff declares that he bought of the defendant *diversa bona & catalla, viz. unum fulcrum lecti, Anglice, a field bedstead*, with a tester and curtains of say, *unum canopium (vocat' a canopy,)* &c. and that the defendant promised to deliver *bona præd'* but had not &c. and there is a *verdict* for the plaintiff, and *general damages* given, it shall not be presumed, that any damages were given for the tester and curtains, which were not alledged *positive*, but only *expositive*; and this exposition is too extensive, for *fulcrum* signifies the bedstead only.

Sixthly, Of the Judgment and Execution.

1. Judgment may be reversed *quoad executionem* only upon an *Elegit. Hob. 90.*

2. Where and in what cases a man may have judgment without convicting the defendant of any wrong. *Hob. 198, 199.*

P * 337. 3. Where judgment may be reversed by a writ of error, the party shall not be allowed to do it by plea, but a stranger to it must avoid it by plea, because he is no party to the judgment; as if a *scire facias* be brought against the bail, it is a good plea for them to say, that the principal was dead before given; it is by way of excusing themselves to * bring in the body; but it is not good to avoid the judgment, because it is against the record, which must be avoided by writ of error. *Cro. Eliz. 199. 2 Mod. 308. Roll's Abr. 449, 740.*

4. When a judgment is once executed, the goods are *in custodia legis*, and shall not be taken away by an exchequer process, or by the commissioners of bankrupts. *3 Mod. 236.*

5. Judgment against two, who both died, a *scire facias* was brought against the administrator of one of them; and after two *nichils* returned, she brought an *audita quarela*, and judgment was given, that she ought not to be charged alone. *4 Mod. 315.*

6. Judgment for the plaintiff must not be signed till four days after the *poslea* returned; *aliter* for the defendant. *5 Mod. 205.*

7. The antient manner of pleading in arrest of judgment, was like other pleadings formerly, *ore tenus* at bar, but was always of some error appearing in the face of the record; and if at such day the defendant had made default, then any body, as *amicus cur'*, might move in arrest of judgment any matter, and plead that which the party

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party himself might have pleaded, and for a precedent of a plea in arrest of judgment, *vide Co. Ent.* 95.

8. Where a judgment was reversed, because it appeared, that the money demanded was not yet payable. *2 Saund.* 107, 108.

9. In *assumpsit* against an heir to pay money due on the bond of his ancestor, judgment was stayed after a verdict for the want of an averment, that the heir of the obligor was bound. *2 Saund.* 135.

10. Where judgment was arrested for the incertainty of a verdict, in that the jury found damages for the plaintiff, after the action brought in covenant. *2 Saund.* 171.

11. Where the court will not let a judgment (neglected) to be entered after a rule given, without examining into the cause of not entering it. *6 Mod.* 59.

12. Judgment of a precedent *Hillary* Term, and the plaintiff died before costs settled, and next *Hillary* Term judgment being entered, as of the first *Hillary* Term, was set aside. *6 Mod.* 191.

13. If a rule be for a cause to stay till the court be further moved, and the court is divided, there needs no new rule from the court, and the plaintiff may, without more, enter up his judgment upon the verdict; but if the case be ruled to be put in the paper for arrangement, or the last rule be a *cur' advisare vult*, and the court be divided, there can be no judgment. *6 Mod.* 203.

14. In *B. R.* after a rule to sign judgment, there must be four days exclusive of the day on which the rule was given, and of which the judgment is signed; but in the common pleas, they stay till the *quarto die post*, which is but four days inclusive. *6. Mod.* 241.

15. Where the plaintiff shall have judgment for that, for which the action is well brought, and be barred for the residue, and where not. *Goulds.* 85.

16. If damages are insufficiently assessed, or not assessed where they ought to be, the plaintiff by releasing damages, shall have judgment for the rest. *11 Co.* 56.

17. If an action be brought against an infant and another, and both appear by attorney, the judgment is erroneous, and shall be reversed as to the whole. *2 Cro.* 290.

18. *Indebitatus assumpsit* against *A.* and *B.* judgment by default against *A. B.* pleads payment, and a verdict for him, this shall not discharge *A.* *Salk.* 23.

19. If the defendant moves in arrest of judgment, upon which judgment is stayed several terms, and then the plaintiff dies, the court may give judgment, *nunc pro tunc*, as of the first term, at which term the plaintiff was alive. *1 Syd.* 462.

*20. If final judgment be entered without an interlocutory judgment on a demurrer, it is error. *2 Mod. Case 7.* P *338.

21. In an inferior court on a demurrer to a plea, judgment was entered *pro cont' est*, without *quia videtur Cur'*, and held ill. *Salk.* 402.

See more hereafter concerning Judgments. V. the Table.

There

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There is likewise an action which savours of an Assumpsit, and of a Tort; as an action for a disceit, and on a warranty of that which is not so as it was warranted; and there being but few cases under this head, I shall insert them only in the following manner.

1. An action on the case in the nature of disceit lies against one who cheats another at cards. *Moor. 776. Baxter v. Woodyear and Orbet.* And so it does for playing with false dice. *1 Cro. 90. Harris v. Bowden.*

2. For an infant affirming himself to be of full age, *ubi revera* he was under age, *per quod* he got great sums of money on mortgages; and in this case the court was moved, that the defendant should put in special bail; but the motion was not granted. *2 Syd. Chetwin v. Vennor.*

3. After a verdict for the plaintiff in an action on the case for affirming himself to be of full age, *per quod* the plaintiff lent him great sums of money; *ubi revera* he was under age, and thereby had avoided his security; after verdict for the plaintiff, it was moved in arrest of judgment, that no action lay against the defendant for this; and for this cause judgment was staid. See *2 Syd. 253. Johnson v. Pye, S. C. 1 Lev. 169.*

4. No action lies against a married woman for affirming herself to be sole, *per quod* the plaintiff married her, because all contracts of a feme covert are void. *1 Lev. 247. Cooper v. Whetham & ux.*

5. No action lies for one tenant in common against the other for a disceit concerning the thing they are tenants in common of. *1 Lev. 29. Graves v. Sacer. S. C. Raym. 15.*

6. If any person sells corrupted meat, though he do not warrant it, yet an action on the case would lie against him; so if one sells bad cloth, knowing it to be so, though he do not warrant it, an action on the case lies; but if the seller of the cloth did not know it to be bad, and did not warrant it, then no action will lie. See *Keilw. 91.*

7. If *A.* had money delivered to him to be paid to *B.* and *C.* knowing of this, comes to *A.* and affirms himself to be *B.* and *A.* pays *C.* the money, *A.* may have an action on the case against *C.* for this disceit. *Moore 583. Thomson v. Gardner.*

8. The plaintiff declared, that her servant bought 12 oxen of the defendant for 80*l.* for the plaintiff, and paid the 80*l.* and the servant afterwards died; and then the defendant fraudulently and falsely affirmed to the plaintiff, that the 80*l.* was not paid, with an intent to prevail on the plaintiff to pay the money over again, who *fidem adhibens* to the defendant's allegations, did pay the 80*l.* to the defendant. After verdict for the plaintiff, it was moved in arrest of judgment, that no action on the case lay, but an action of account;
per

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per Cur', the plaintiff may have either. *W. Jones* 196. *Lady Cavendish v. Middleton*. S. C. 3 Cro. 141.

9. Action upon the case for deceit; whereas *Bernard Wells* was the plaintiff's servant in *Com' Derby*, and had 65 l. of the plaintiff's in his custody, that the defendant to deceive the plaintiff of the said 65 l. *quandam literam* in the name of the plaintiff procured to be written, and directed it to the plaintiff's said servant, and counterfeited the name of the plaintiff thereto, and sealed it *quasi* with the said plaintiff's seal, and caused it to be delivered to the said *Bernard Wells*, affirming it to be the *plaintiff's letter, and that he was sent P *339, therewith unto him by the plaintiff; whereupon he caused the same to be read, and upon reading thereof, understanding *quod in eadem litera continebatur*, that the plaintiff had appointed the said *Bernard* to pay and deliver to the defendant the said 65 l. to the use of *Thomas Bartlet*, to whom it was supposed by the said letter that he was indebted; and affirmed that he was a servant unto the said *Thomas Bartlet*, and that he was to receive the said 65 l. for his master. By reason whereof the said *Bernard* giving credit unto him, paid and delivered unto him the money; *ubi revera* the letter was counterfeited, and he never sent the defendant, nor was indebted in any such sum &c. The defendant pleads Not guilty, and found against him to his damage of 105 l. and it was thereupon moved in arrest of judgment, first, that this supposition *quandam literam scribi fecit*, where it ought to be *literas*, for it is not possible that one letter could comprehend what was supposed to be wrote: secondly, that this action lies for the servant, and not for the master. Thirdly, that it was not shewn what was contained in the letter; for it is only, that the said servant *intelligebat* what was therein written, and that might be his misconstruction. But all the court, after several motions, held it to be well enough; for the deceit and abuse is to the master, and the loss only to him; wherefore the action well lies for him, although it is not set down precisely what was in the letter; but that *intelligebat* such matter was contained therein, which is uncertain; yet because the deceit is alledged to be in the delivery of the counterfeit letter, and affirming, that he was servant of *Thomas Bartlet*, and sent by the plaintiff to receive such a sum as due by him to the said *Thomas Bartlet*, (all which was false) all which being a deceit; upon the whole matter the action well lies, and it was adjudged for the plaintiff; and afterward a writ of error being brought thereon, and all these matters assigned for error, the judgment notwithstanding was affirmed. 2 Cro. 223. *Tracy v. Veal*.

10. An action on the case was brought for selling bills of public faith, that were false, knowing them to be false, with an intent to deceive the plaintiff; on a demurrer to the declaration, several exceptions were taken, but the most material one was, that the plaintiff said they were assigned to him in due form of law, but did not expressly

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expressly shew what that due form was ; but it was resolved by *Rolle* Chief Justice, that the ground of the action was the deceit, which was confessed by the demurrer ; and that all the other things were merely matter of circumstance ; and judgment was given for the plaintiff. *Stile* 343, 398. *Fowke v. Boyle.*

11. In an action on the case for delivering of a false note of goods that were exciseable, *per quod* he was forced to pay 50 l. After a verdict for the plaintiff, on Not guilty pleaded, it was moved in arrest of judgment, 1st. That the act of parliament that erected the excise was not set forth. 2dly. That the damage was not coupled with the fraud. 3dly. That it was not shewn how he was obliged to pay the 50 l. But *per Rolle*, Chief Justice, the fraud is the ground of the action, and all these things are but matter of circumstance ; in an action brought for the recovery of damages for a fraud, it is no more necessary to set forth all the circumstances, than in an action grounded on a fraudulent judgment, it is necessary to set forth all the processes therein ; so the plaintiff had judgment. *Stile* 368. *Brighwell v. Robson.*

12. An action on the case was brought for affirming a term of years to be worth 250 l. *ubi revera* it was worth but 100 l. After verdict for the plaintiff it was moved in arrest of judgment, that no action lay on the bare affirmation of its value, there being no warranty ; and of that opinion was the court. *Yelv.* 20. *Harvey v. Young.* But this is to be understood of things of uncertain value, because such things may be worth more to one than to another ; but P *340. if the false affirmation had concerned a thing of a determined worth ; as if the defendant had affirmed a house to be let for 50 l. *per ann.* whereas it was let for 20 l. the action would well lie. See 2 *Syd.* 146. *Leakins v. Clisset.* S. C. 1 *Lev.* 102.

13. Action upon the case, for that the defendant *falso & deceptively* sold unto him such a day 220 sheep, affirming that they were his own sheep ; *ubi revera* they were the sheep of J. S. The defendant pleaded Not guilty, and found against him, and it was moved in arrest of judgment that the action lay not, because he doth not shew that the defendant had committed any offence in affirming them to be his ; and he doth not shew that he had any damage, or that J. S. had re-taken them, or sued him for them ; as 24 *Aff.* 8. *sed non allocatur* ; for the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a stranger's is an offence, and cause of the action ; and if he should tarry until the goods were taken from him again, it might peradventure be mischievous unto him, and he should be without remedy : wherefore, *absente Montague*, it was adjudged for the plaintiff. 2 *Cro.* 474. *Furnis v. Leicester.* See *Show.* 63. *Crofs v. Gardiner.* S. C. 4 *Mod.* 261.

14. In an action on the case, the plaintiff declared the defendant sold him a gelding, and on the sale did falsely affirm unto him that

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that the gelding was his own, and that he bred him of a colt, whereas he did not breed him, and that he was not the defendant's, but *J. S.'s*. After a verdict for the plaintiff, it was moved in arrest of judgment, first, That this action did not lie, because the defendant did not warrant the gelding. Secondly, It was not expressly charged in the declaration, that the defendant knew the gelding to be another's; but notwithstanding these exceptions the court gave judgment for the plaintiff. *Stile 310. Harding v. Freeman.*

15. An action upon the case in nature of a deceit, was brought, and the plaintiff declared, Whereas upon the ninth of *June, 25 El. Queen Elizabeth* was seized in fee of the advowson of the vicarage of *South-Stoke*, whereunto the tithes in *S.* appertained; to which vicarage the defendant on the 9th of *June, 35 Eliz.* affirmed that he was lawful incumbent, and had right to the tithes, from the death of *Thomas Vaughan* the incumbent; whereupon the plaintiff, 16 *June, 35 Eliz.* having communication with the defendant about his buying of the defendant the tithes appertaining to the said vicarage after the death of *Thomas Vaughan* (who died 16 *April, 35 Eliz.*) until *Mich.* following; that the defendant, *adunc sciens* that he had not any right or interest to the tithes (whereas he was never instituted and inducted) but that they appertained to *Evan Thomas*, sold them to the plaintiff for 30 *l. falso & deceptive*; and alledged in *facto*, that *Evan Thomas* was presented, admitted, instituted and inducted to that vicarage, *ult. Aug. 35 Eliz.* and took the tithes, and so the plaintiff lost them. The defendant pleads Not guilty, and found against him; and it was moved in arrest of judgment, That the action lieth not; for an action in nature of deceit lieth not, where one sells a thing which he has not any property in; and although he in discourse undertook, that he was owner, and had a right to sell, unless he warrants that the other should enjoy it accordingly (which warranty ought to be at the time of the sale) it is not good; but there is not any warranty nor affirmance at the time of the sale, that he had any right or title to sell; for his affirmance that he was vicar, and had a right to sell, was upon the ninth of *June*, and the sale was the 16th of *June* after; and in proof hereof, relied upon 5 *H. 7. 41.* 9 *H. 7. 21.* and *Chandelor and Lopus's Case, Pasc. 1. Jac.* And of that opinion were *Tanfield*, Chief Baron, and *Altham*. But if a man sells victuals which is corrupt, without warranty, an action lieth, because it is against the commonwealth; as 9 *H. 6. 53.* 7 *H. 4. 15.* and 11 *Ed. 4. 6.* and although the book of 42 *Aff. pl. 8.* was objected, where *one took goods from another and sold them, P *341. and the owner retook them, that an action upon the case was brought in nature of deceit, for this falsity in sale, without any warranty. *Tanfield* thereunto answered, that the said fact is not adjudged, but the party admits it, and takes issue; yet if it were allowed to be law, it is because he there had possession by tort, and so had colour in shew to be owner; and he was deceived by

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by buying of them, who had only gained a tortious possession : and although he had not any right, yet every one took consufance of him as owner, and he himself knew that he was not the right owner ; which is the reason that the action was maintainable : but here he had not any possession ; and it is no more than if one should sell lands wherein another is in possession, or a horse, whereof another is possessed, without covenant or warranty of enjoyment, it is at the peril of him who buys ; and there is no reason he should have an action by the law, where he did not provide for himself ; wherefore it was adjudged for the defendant. 2 Cro. 196. *Roswell v. Vaughan.*

16. Action upon the case ; whereas 10 Decemb. 11 Jac. there was communication betwixt the plaintiff and defendant, concerning the hiring of the plaintiff to carry for the defendant, with horses and wain, a load of madder, from *Exhall* in the county of *Essex*, unto *Uppingham* in the county of *Rutland* ; and that then and there, to deceive him in the carriage thereof, he affirmed fraudulently that the said load of madder was but of 800 pounds weight ; and that he giving credit to this affirmation, undertook the carriage of the said madder, and that the defendant promised to pay him for every hundred weight 2 s. 8 d. and that he giving credit that the said madder was 800 weight, carried it according to the said agreement, and alledges *in facto* that the said load of madder weighed much more than 800 weight, viz. 2200 weight, by reason whereof his horses drawing the said wain, with the load of madder, being laden with so great weight, were compelled *ita vehementer laborare & trahere*, that seven of his horses which drew the said wain, *rati-one inde peribant, per quod, &c.* The defendant pleaded Not guilty, and found against him ; and it was now moved in arrest of judgment, that this action lieth not ; for he being hired to carry by the hundred, it was his own folly to overload his horses, and it was a matter which lay in his own view and consufance ; and if he doubted of the weight thereof, he might have weighed it, and was not bound to give credit to another's allegation ; and being his own negligence he is without remedy ; as where *A.* buys an horse, upon warranting him to have both his eyes, and he had but one, *A.* is remediless ; for it is a thing which lies in his own consufance, and such warranty or affirmation is not material, or to be regarded. But otherwise it is in case where the matter is secret, and lies properly in the consufance of him who warranted it, and cannot be known to him who buys or makes the contract ; for the law gives no remedy for voluntary negligence ; and of that opinion was the whole court, although it was said, that there was apparent fraud here in him who affirmed, &c. and peradventure the plaintiff was a stranger to the weight when he undertook the carriage, and had no weights to weight it ; but it was answered, it was his negligence, that he would take a weight so far exceeding the affirmation, without causing it to be weighed ; wherefore judgment was staid.

2 Cro. 386. *Baily v. Merrell.* S. C. 3 Bulst. 94. 1 Cro. 793.

17. Action

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17. Action upon the case; whereas *Bud* had brought an action of debt in the common bench, upon a bill of 40 l. against the plaintiff, and upon examination, it appeared to the court, that all besides 28 s. was paid; whereupon they in *Trinity* term, ordered, that if the plaintiff would accept of the 28 s. with such damage as the court should assess, then the now plaintiff should imparl until *Michaelmas*. That the defendant knowing this order, had procured a *nilhil dicit* to be entered, and *upon this deceit he brought this action. P *342. And it was thereupon demurred, First, In regard of the manner of the pleading, because he doth not aver, that he tendered the 28 s. for otherwise the plaintiff (then defendant) was not to have the benefit of the order. Secondly, This action lies not in respect of the matter; for this entering of the *nilhil dicit* is the fact of the court, whereupon none can reap advantage, nor any action lies for it; and in proof thereof was cited 26 *Aff. pl.* 46. and 21 *Ed.* 4. 22. where a writ of privilege was granted without cause, no action lies. But all the court held, that the action for this matter would well lie, for procuring a *nilhil dicit* to be entered in abuse of the court, whereby the party, defendant in the action, suffered prejudice. And therefore if one procures another to sue me without cause, an action lies not against him who sued without cause; but for this falsity in procuring my vexation, an action well lies. So where one casts a protection in delay of my action; and likewise for every falsity an action on the case is maintainable; but here this is not good for the matter, because there is not any tender, or refusal in the other to accept of the 28 s. alledged; for without that there is not any breach of the order in the now defendant; and his then procuring of the *nilhil dicit* was lawful; wherefore judgment was arrested. 1 *Cro.* 793. *Berren v. Bud.*

18. In an action upon the case, whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to *Lopus* to be a bezoar-stone, and sold it unto him for 100 l. *ubi revera* it was not a bezoar-stone. The defendant pleaded Not guilty. After verdict, and judgment for the plaintiff in the King's Bench, error was therefore brought in the Exchequer-chamber; because the declaration contains not matter sufficient to charge the defendant (*viz.*). That he warranted it to be a bezoar-stone, or that he knew that it was not a bezoar-stone; for it may be, he himself was ignorant, whether it was a bezoar-stone or not. And all the justices and barons (besides *Anderson*) held, that for this cause it was error; for the bare affirmation, that it was a bezoar-stone, without warranting it to be so, is no cause of action; and although he knew it not to be a bezoar-stone, it is not material; for every one, in selling of his wares, will affirm that his wares are good, or the horse that he sells is sound; yet if he warrants them not to be so, it is no cause of action; and the warranty ought to be made at the same time of the sale; as *Fitz. N. B.* 94. c. and

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c. and 98. b. 5 H. 7. 41. 9 H. 6. 53. 12 H. 4. 1. 42 Aff. 8. 7 H. 4. 15. Whereas, forasmuch as no warranty is alledged, they held the declaration to be ill. But *Anderfon*, to the contrary; for the selling it for a bezoar, whereas it was not so, is a cause of action; but notwithstanding it was adjudged to be no cause, and the judgment was reversed. 2 Cro. 4. *Chandlor v. Lopus*.

19. In an action on the case, the plaintiff declared, that the defendant being possessed of divers goods, *viz.* of three counterfeit jewels; and having factors in *Barbary*, and knowing that the plaintiff was beyond the seas, he acquainted his factor therewith, and commanded him to conceal the counterfeiting thereof, and directed him to the plaintiff, being there; and the factor came unto the plaintiff, and entreated him to sell those jewels for him, telling him they were good jewels; whereupon the plaintiff not knowing that they were counterfeit, sold the jewels, being of the value of 100 l. to the king of *Barbary* for 800 l. and delivered the money to the factor, who delivered it over to his master; that the king of *Barbary* afterwards finding they were counterfeit, committed the plaintiff to prison until he repaid the said king 800 l. and that afterwards the plaintiff requested the defendant to pay back unto him the said 800 l. and he refused. The defendant pleaded the general issue; and the jury upon a special verdict, found all this matter, excepting, that the defendant had directed his factor to the plaintiff, and that the defendant had commanded his factor not to dis-

P * 343. *cover that the jewels were counterfeit. And it was argued for the plaintiff, first, that where one is party to a fraud, all which followed by reason of that fraud, shall be as done by him; and here the defendant is the first actor in this fraud; first, by his knowing they were counterfeit; secondly, by sending his factor, and selling them in *Barbary*. And to that purpose were cited *Plowd. Comment.* 473. *Saunders's Case* of the poisoned apple; and *Co.* 9. 81. *Gory's Case*; and in this case it is a deceit, although there be not any warranty; as 9 H. 6. 53. and 21 Aff. pl. 41. and 42 Aff. pl. 8. 7 H. 4. 15. 11 E. 4. 6. 5 E. 4. 126. and *Co.* 4. 18. 20 H. 6. 35. and *Chandler and Lopus's Case* adjudged in this court 1 Jac. where one sells a bezoar-stone, *sciens* that it was counterfeit, and he did not warrant it; yet for that it was *sciens*, the plaintiff had judgment. Secondly, he held, that although the jury had not found all the matter contained in the declaration; yet because they have found matter sufficient, the plaintiff shall recover: and to that purpose were cited *Bride's Case*, in *Dyer* 75. and *Sir John Sydenham's Case v. Man* in this court, where the words were, *If Sir John Sydenham could have his will, he would kill, &c.* and the jury found that he spake these words, *I think in my conscience if Sir John, &c.* And it was adjudged, that although the verdict be different, the plaintiff could recover, &c. so here, &c. And it was argued to the contrary for the defendant, that the finding in the verdict,

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dict is so material in point of variance, that there remains not that
 ter sufficient in the declaration to maintain the action, First, They
 cannot be said to be counterfeit jewels because it is confessed by the
 plaintiff, and so found by the jury, that they were of the value of
 100 l. which is a competent value for good jewels, and the value
 of the jewel consists in the estimation of him who will buy it; and
 to that purpose was cited 38 & 39 *Eliz.* in the Common Bench,
Dampat v. Symfon. Secondly, because there was not in this case any
 warranty made to the plaintiff, that it was a good jewel; as 11 *Ed.*
 4. 6. 7 *H.* 4. and 13 *H.* 4. 1. Thirdly, That the deceit done
 unto the plaintiff is found to be done by his servant; and the jury
 find that the master did not command the servant to conceal them to
 be counterfeit; and then by his general power to sell the master
 shall not be charged, if the servant exceed his power. *Vid.* 9. *H.* 6.
 33. and *Doctor and Student*, 137. Fourthly, For that the servant
 had but a power given him from his master to sell, which power he
 cannot assign over to another. Therefore for these material vari-
 ances an action upon the case, being an action founded upon the
 truth of his case, which if it fail, the action also perisheth, he con-
 ceived the action was not maintainable; and to that opinion the
 justices inclined, and principally for the third reason. And in *Trin.*
 16 *Jac.* it was argued again by *Davenport*, for the plaintiff, who
 answered to that objection, that for the sale by the servant, the
 master ought not to be responsible; and he said, that as the fraud
 in the master was general, and his direction for the sale thereof,
 therefore he shall be answerable for the damages that any particular
 person hath thereby; and compared it to the case of 27 *H.* 8. 22.
 of a nuisance in the highway; and what is done by the servant, the
 master shall not avoid, appears 9 *H.* 6. 53. and 11 *Ed.* 4. 6. *Long*
 5. *Ed.* 4. 17. *Dyer* 238. In this case also the master's receipt
 of the money for the jewels joined with his precedent command,
 shall charge himself; for an assent subsequent without any prece-
 dent commands, shall charge him as his own act. 2 *H.* 7. 17. 2
H. 4. 18. And as to that objection, that there is such material
 variance betwixt the verdict and the declaration, that it destroys
 the action. He said, that where many circumstances are alledged to
 induce an action, and some part of them are material, and some
 not, if so much be found by the verdict to maintain the action, it is
 good enough; otherwise it is in an *assumpsit* upon two considera-
 tions; if the jury find the one, and not the other, there the action
 fails, because the *assumpsit* is found upon the total consideration; P * 344.
 as 27 *H.* 8. 24. Sir *Thomas Coventry*, solicitor general, for the de-
 fendant, and he vouched several cases wherein the master is not
 charged for the act of his servant; as to the book of 9 *H.* 6. 53.
 urged against him, he said, that *Fitz. N. B. f.* 94. is otherwise;
 which is, that if one sells certain pipes of wine, with warranty, and
 they are corrupt, action upon the case lies; which implies, that it
 lies

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lies not without warranty, that may be reconciled; for as 11 E. 4. 6. is, if a man sells corrupt victuals, and action upon the case lies without warranty, because it is prohibited by the law to sell corrupt victuals; but in the same case of wine, if it be small wine, and the party buys it for strong wine, no action lies. And in this case, although the defendant commanded his servant to sell, &c. it is to be taken a sale in a lawful manner; as 11 Ed. 4. and 9 H. 6. 51. 13 H. 7. 15. The plaintiff also in this case, hath not alledged any legal damage; for he ought to have alledged, that he was arrested and imprisoned after the law of *Barbary*; but if the imprisonment were tortious, then he hath not any legal damage; as 38 H. 6. is. But here be three material variances betwixt the declaration and the verdict, so as there cannot be any cause to maintain this action. &c. *Dodridge, Justice*, If a goldsmith makes plate, wherein he mingles dross, so as it is not according to the standard, and sends his servant to a fair to sell it, who sells it for good plate, according to the standard, an action upon the case lies against the master. *Ad quod Montague* assented, because it fails in the price in silver. But here it fails but in the value; for jewels are sold for their valuation. Note this diversity *pretii & valoris*. *Haughton, justice*, if one command his servant to sell an ill horse, and the servant sells him for a good one, whereby the servant is arrested and indamaged, yet the servant shall not have his remedy against his master. And *Doderidge* cited a case to be adjudged 33 Eliz. in the Common Bench; a clothier of *Gloucestershire* sold very good cloth; so that in *London*, if they saw any cloth of his mark, they would buy it without searching thereof; and another, who made ill cloth, put his mark upon it without his privity, and an action upon the case was brought by him who bought the cloth, for this deceit, and adjudged maintainable. But the court in the principal case inclined in their opinions against the plaintiff. 2 Cro. 468. *Southern v. How*. S. C. 2 Roll. 5. S. C. *Popham* 26. S. C. *Bridgman* 125. Note; By the other books it does not appear that there was any judgment given in this case; but *Bridgman* says, judgment was given for the defendant.

20. Action upon the case, for that the defendant, 31 Maii, 19 Jac. had bargained with the plaintiff to sell him a mare; the defendant *adtunc & ibidem sciens* the said mare to be lame & *variis infirmitatibus deficere*, viz. with spavins, splints, & *ad laborandum impotentem, equam præd' sanam & absque ulla infirmitate warrantizavit, eandem equam præd' 31 Maii, 19 Jac. pro 20 l. apud London, &c. eidem Willielmo falso & fraudulentè adtunc & ibidem vendidit & sic dictus def. fallaciter decepit* the plaintiff in the said mare, to his damage, &c. The defendant pleaded Not guilty, and found against him; and it was moved in arrest of judgment, that the declaration was not good; first, because he doth not say, *warrantizando vendidit*; for otherwise it may be, that the warranty was at

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one time, and the sale at another time, although they were both in one day, and then the action is not maintainable. And although the precedents in the book of entries, be in this manner, it was answered, that it is *warrant. vendidit*, which being shortly writ, may be expounded *warrantizando*, which conjoins it to the sale; but as it is, it may be otherwise intended, and then the declaration is naught. Secondly, this declaration is uncertain for want of the word (*et*) after the *warrantizavit*; for as it is, it is insensible. And of that opinion were *Doderidge* and *Chamberlain*. But *Lea*, chief justice, did not deliver any opinion; *wherefore the defendant appearing, the plaintiff declared *de novo*. 2 Cro. 630. Sir William Pope v. Lewyns. P *345.

21. In an action upon the case was brought in nature of a deceit, that the defendant had sold to the plaintiff certain sheep, and had warranted them to be sound, when in truth they were rotten. The defendant pleads, that they were sound at the time of the sale, *et de hoc ponit se super patriam*. The plaintiff demurs, and it was adjudged for him, because the defendant had taken a traverse to the cause of action, *viz. absque hoc*, that they were rotten; and issue shall not be taken upon two affirmatives. 4 H. 7. 13. a. 1 H. 7. 9. b. c. *Ney* 124. *Reedhead v. Harper*. S. C. *Yelw.* 124.

22. In an action on the case the plaintiff declared, that the defendant sold him tithes for so much money, *sciens* that he had no lawful title to them. After a verdict for the plaintiff, it was moved in arrest of judgment, that the declaration did not expressly charge that the defendant had no title; yet the plaintiff had judgment. *Moor* 467.

23. In an action on the case, the plaintiff declared, that the defendant sold him two oxen, and warranted them, &c. The jury on *non culp'* pleaded, found that the defendant sold one ox; and it was attested that this did not maintain the declaration, because the contract, which is supposed to be joined to the warranty, is variant from what the jury found; but the court gave judgment for the plaintiff, because the action is grounded on the deceit, and not on the warranty. 1 Cro. 884. *Gravenor v. Meere*.

24. In an action on the case for a deceit, the plaintiff set forth, that he bought several parcels of silk for ——— silk, whereas it was another kind of silk; and that the defendant knowing this deceit, sold it him for ——— silk. On the trial, upon Not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was his factor beyond sea; and the doubt was, if this deceit could charge the merchant? And *Holt*, chief justice, was of opinion, that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing some body must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver, should be a loser, than a stranger: and upon this opinion the plaintiff had a verdict. 1 Salk. 289. *Hern v. Nicholas*.

In

Readings and Observations

In this Action for Trover and Conversion, the Cases in the Books
are distributed under the following Heads.

First, In what Instances it hath been held that this Action may be brought.

Secondly, By whom.

Thirdly, Against whom this Action may be brought.

Fourthly, Of the Declaration.

Fifthly, Of the Plea.

Sixthly, Of the Trial, Verdict and Evidence.

Lastly, Of the Judgment and Execution, and the Consequence of such Judgment.

First, In what Instances it hath been held that this Action may be brought.

P* 345 1. The trover is but an inducement to the wrong complained of, and it is the conversion only that is material; as where an action upon the case was brought upon a trover and conversion of twenty barrels of *butter, and declared, that by negligently keeping of them, they were become of little value; upon which there was a demurrer in law, and by the opinion of the whole court upon this matter no action lieth; for a man who comes to goods by trover, is not bound to keep them so safely, as he who comes to them by bailment. *Walmesley*: If a man finds my garments, and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth: but if he weareth my garments, it is otherwise; for wearing is a conversion. 1 *Leon.* 224. *Waldgrave v. Ogden*, reported in 1 *Cro.* 229. by the name of *Mulgrave v. Ogden*.

2. If a man takes my horse and rides him, and after redelivers him to me, yet I may have this action against him; for this is a conversion, and the redelivery is no bar of the action, but shall be only in mitigation of damages. *Trin.* 38. *El. B. R. per curiam*, in the countess of *Rutland's Case*. 1 *Roll's Abr.* 5. Letter *L. pl. 1.* 1 *Leon.* 223. *Gouldsb.* 155. *Stile* 261. 1 *Bulstr.* 38.

3. If a man finding goods, and knows them to be mine, and he refuses and denies to deliver them to me, this is a conversion in law, *Mich.* 38, 39 *El. R. R.* between *Easton and Newman, per Cur'*; which intratur *Hil.* 37 *El. B. R. Rot.* 460. for the denial makes him a trespasser *ab initio*; for this shews his intention to have been so *ab initio*. 1 *Roll's Abr.* Letter *L. pl. 2.*

4. But it was held, 2 *Bulstr.* 312. that if a man has my horse, and I demand it, and he refuses to deliver it, telling me he does not know whether I am the right owner or no, it is no conversion. *Moer* 460, 843. 1 *Roll's Rep.* 131. *V. 2 Roll's Abr.* 561. *pl. 6.*

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5. If a man delivers goods or money to another, and after upon my demand he refuses to restore them; yet this is no conversion, but only evidence of a conversion, in as much as he came to them by my own delivery. *Hill. 12 Jac. B. R. between Isaac and Clerk, Moor 841.*

6. If I deliver goods to a common carrier to carry to a certain place, and after the goods are stole from the carrier, this is no conversion in the carrier, so as to charge him in a trover and conversion; but an action upon the case lies against him, as a carrier upon the custom of the realm to carry goods safely, and them to deliver as he is appointed. *Mich. 14 Car. B. R. between George and Wilburn, per Curiam, in arrest of judgment. 1 Roll's Abr. f. 6. pl. 1.*

7. If one delivers goods to another to be kept safely, whether for hire or not, and the party undertakes to do it; if by his default they are damaged, case or detinue will lie; but if the party bring detinue, he shall recover the goods in such plight and condition as they are in, and it shall be adjudged the folly of the plaintiff to bring an action which is no adequate remedy, when he might have had one that was; but if the party sell the goods, then the bailor shall have an action of detinue, not one of trover, according to the opinion of some; but according to the opinion of others, (and so the law is now understood) the party hath his election, and may bring either; for the selling the goods is a misdemeanor, which is ever a good cause to bring an action on the case. See *Keil. 160. See 4 Leon. 189.*

8. An action of trover and conversion of 100 musk cats, and 60 monkeys; the defendant pleads not guilty, and found against him; and it was moved in arrest of judgment, that an action lay not, because he doth not shew, that they were tame or reclaimed; as 12 H. 8. and 14 Eliz. *Dyer*, for a hawk; *sed non allocatur*; for they be merchandize, and valuable; and so it is of an action for a parrot. Wherefore it was adjudged for the plaintiff. 2 *Cro. 262. Grymes v. Shack.*

9. An action of trover was brought for several things, and among the rest *de uno Æthiope, vocat.* a negro; and on Not guilty pleaded, verdict was for the plaintiff, and several damages, and as to the negro it was moved in arrest of judgment, that the action would not lie, for that the owner had not an absolute property in him; he could not kill him as he could an ox. And it was said that property P * 347. implies the right of having and enjoying, and disposing; but it does not always imply a power to destroy; though this power holds in beasts, fowl and fish, which were made the property of mankind by the act of God, and have a natural existence; yet in things incorporeal, which consists in *Jure tantum*; it being a property *ex instituto* only, the owner has only a power according to the measure of his instituted right: And it was instituted in the case of a common, a way and a ward. On a *Ca. Sa.* the plaintiff has an interest in the body of the prisoner as a pledge, not to sell, but to keep, and

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and it goes to executors. *Hob.* 61. In a servant, to work him; in a captive, to sell him. *Leg.* 102. *F. N. B.* 18. *a. B. N. C.* 295. *Bro. Property*, 38. *1 H. 6. ch. 5.* in *Rast.* 219. *Cot. Ab.* 460. That the writ *de nativo habendo* must lay the explees of a villain in working and taxing him at will. *Co. Ent.* 406. That by the law of *Moses* a man may be a slave; and a slave was a chattel, his master's money, *Exod.* xx. 21. That by the same reason there may be a *servus prædialis*, i. e. a villain; one may be a *servus personalis*, and that first a captive, and afterwards a villain. *Hob.* 27. *Brownl.* 78. A villain in gross is a chattel, for he is of a perishable nature, and cannot endure for ever. So is *Fitz. Discontinuance*, 16. *Br. Villain*, 60. As villains are regardant to land, it is a different thing; and in that respect they are inheritances, and so are the charters. Every villain is intended in law regardant; the writ in the register therefore supposes him to be *nativum suum*, but before he was a villain, he was a captive, and then a chattel: lastly it was insisted, that the court ought to take notice that they were merchandize, and cited, *2 Cro.* 262. The case of monkies. *2 Lev.* 201. *3 Keb.* 785. *Inst.* 112. If I imprison my negro, a *habeas corpus* will not lie to deliver him; for by *magna charta* he must be *liber homo*. *2 Inst.* 45. *Sed curia contra*; men may be the owners, and therefore cannot be the subject of property. Villainage arose from captivity, and a man may have trespass *quare captivum suum cepit*, but cannot have trover *de gallico suo*; and the court seemed to think that, in trespass *quare captivum suum cepit*, the plaintiff might give in evidence, that the party was his negro, and he bought him. *2 Salk.* 666. *Smith v. Gould.* See *2 Lev.* 201. *Butts v. Penny.* *2 Lev.* 337. *Chambers v. Warkhouse.*

10. To an action of trover and conversion of 25 l. the defendant pleaded Not guilty; and the jury found a special verdict, that the defendant being servant and factor to the plaintiff, sold twenty quarters of his master's corn for 25 l. and receiving it, converted it to his own use. *Stephens* moved for the defendant, that this verdict is found for him; for this 25 l. was never in his master's possession, nor his money, and this action lay not, but rather an account. This also is money out of any bag; wherefore, &c. But *Fenner* held, that it is found for the plaintiff; for the possession of the servant is the master's possession, and it is as if he always had it in his possession. And it hath been adjudged, that the servant being robbed, the master may well bring the action; and that was the *Lord Rich's* case. *Clinch* doubted. Afterwards this case being moved again, the plaintiff had judgment, but that judgment on a writ of error, was reversed; because money being a thing that cannot be known, the property was in the servant, and it appears by the writ that the property of the money is in the receiver; so it is in case of bailment of things that are undistinguishable, the property of them is in the bailee. *1 Cro.* 638, 661, 746. *Holyday v. Hicks.*

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11. In an action upon the case *sur trover* and conversion, grounded upon a deceit, the case appeared to be this; that where there was *A. B.* and *C.* *A.* was indebted to *C.* in such a sum of money, and *B.* in such a sum of money was indebted to *A.* It was agreed between *A. B.* and *C.* that *B.* in discharge of his debt unto *A.* should discharge the debt of *A.* unto *C.* in paying and delivering unto him *certain commodities, which he had in his hands and possession, being properly the goods and commodities of *A.* and which *B.* by and with consent of *A.* did assume, promise, and undertake to deliver unto *C.* in discharge of the debt of *A.* unto him, and *C.* was contented to accept thereof. According to this agreement made between them, *B.* did not according to his promise or undertaking, discharge the debt of *A.* unto *C.* by delivery of the goods unto him, but contrariwise did convert them unto his own use, after the death of *A.* and for this *C.* brought his action on the case for a trover and conversion grounded upon this deceit; and whether this lieth or not, is the question. *Curia.* The whole court agreed clearly in this, that the action is well maintainable; for if a man bails goods to one, to bail them over to another, if he to whom this bailment was thus made to bail them over, contrary to the trust in him reposed, doth not deliver them over, as he was to have done, but doth convert them to his own use, he has by this his deceit, made himself liable to an action, both of the first bailor, and also of the party to whom they were to have been bailed over, and either of them may well have his action against him for this. And notwithstanding the third person here, to whom the goods ought to have been bailed, had never the possession of them; yet this conversion and non-feasance of that which he ought to have done, is a wrong, and very prejudicial to *C.* the third person. And for this wrong, and prejudice, he may have his action on the case, as well as he first bailor. But both of them shall not have their actions; but he that first begins his action, shall go on with the same. *Curia.* The whole court also agreed clearly in this, that this not bailing over, and delivery of the goods by *B.* the first bailee, unto *C.* in satisfaction of the debt of *A.* and according to the agreement made between *A.* and *B.* that this doth clearly in law amount to make a conversion; and that by this he has made himself subject and liable to an action to be brought by the party to whom he should have delivered them. *Williams, justice.* If a man delivers a deed to one, to deliver the same over to another, and he doth not deliver the same over accordingly, the party to whom the deed was to have been delivered, may well have his action for this not delivery of the deed unto him; and with this agrees the case in 28 H. 8. *Dyer fol. 20, 21. pl. 125, 228.* in the grocers case of *London*: by *Mountague* there; if a man delivers money to bail this over, if the bailee doth not perform the condition, he is by this a debtor for the money, or accountable at the pleasure of the bailor. And there *pl. 123.* in every

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every receipt two things are included ; *viz.* either the receipt is to the use of the bailor, or to the use of a stranger, then he is his debtor ; because that the property is not in the bailee. *Curia.* The whole court agreed in this, that the action brought by the plaintiff against the defendant, being the first bailee, for not bailing of the goods according to the agreement, was well brought, and that here was a good conversion in law ; and so by the rule of court, judgment was given for the plaintiff. 1 *Bulst.* 68. *Flewelling* and others against *Rave*.

P * 349. 12. In trover of ten angels, and converting of them, the defendant pleads, that there was a wager betwixt the plaintiff and one *Currance*, concerning the quantity of yards of velvet in a cloak : And the plaintiff and the said *Currance*, each of them delivered into his hands ten angels, and each of them agreed, that if there were ten yards of velvet in a cloak, that then they should be delivered to the said *Currance*, and if not, to the plaintiff ; and alledgeth, *in fact*, that upon measuring of the cloak, it was found, that there were ten yards of velvet therein : Whereupon he delivered them to the said *Currance*, which is the same conversion, &c. And it was thereupon demurred and agreed, first, that an action of trover lies for money out of a bag or chest. But for the plea, *Gawdy* held it to be good enough ; for the measuring thereof is the *fittest way for trying it ; and when it is so found by the measuring, he hath good cause to deliver them out of his hands to him who had won the wager. But *Fenner* and *Popham* held, that the plea was not good : For it may be that the measuring was false, and therefore he ought to have averred *in fact*, that there were ten yards, and that it was so found upon measuring thereof. And he might well have pleaded the general issue, and given all the matter in evidence, for it is but evidence : And when he delivered it according to the intent of the bargain, it is not any conversion. Wherefore by the consent of *Gawdy*, (*absente Clinch*) it was ruled, that judgment should be entered for the plaintiff, unless other matter were shewn, &c. *Cro.* 70. *Ledesham v. Labram*, See 1 *Cro.* 841.

13. Trover for million lottery tickets ; upon evidence it appeared that the plaintiff had given the tickets in question to a goldsmith to receive the money due on them ; that some payments were due, and some were not ; and this goldsmith had received tickets of the defendant, and given him a note to pay to him so many million lottery tickets ; that the plaintiff's tickets were delivered to the defendant by the goldsmith upon this note. It was insisted on, that this note under the goldsmith's hands, could be no evidence against the plaintiff ; but it was read, and *Holt* Chief Justice, said, that the way and manner of trading is to be taken notice of, and the best proof that the nature of the thing will afford, is only required : When goldsmiths give their notes, no witnesses are by ; and their

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notes to pay money or tickets are evidence of the receipt of money. If money is stolen and paid to another, the owner of the money can have no remedy against him that received it; but if bank-notes, exchequer-notes, or million-tickets, or the like, are stolen or lost, the owner hath such an interest or property in them, as to bring an action into whatsoever hands they are come: money or cash is not to be distinguished, but these notes or bills are distinguishable, and cannot be reckoned as cash, and they have distinct marks and numbers on them: he agreed in this case, that if the exchequer, or any private person had paid to the goldsmith the money or the tickets, it would have been a good payment against the owner; but whether it would be so where tickets not due are bought for a valuable consideration, he doubted; but as the case was, the goldsmith having tickets of the plaintiff and of the defendant, the delivery of the plaintiff's tickets to the defendant, was no change of the property, or any consideration; for though the owner gave the goldsmith power to receive money for the tickets, he did not give him power to change them for other tickets; and accordingly a verdict was given for the plaintiff. 1 *Salk.* 283. *Ford v. Hopkins.*

14. The widow of a waterman, who, as was said, by the usage of Waterman's Hall may take an apprentice, had her apprentice taken from her, and put on board a Queen's Ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover: and it was agreed, the action would lie, if the apprentice was a legal apprentice; for his profession would be that of his master, and whatsoever he earns shall go to his master. But it was objected, 1. That the company of Watermen is a voluntary society, and that being free of it, doth not make a man free of London: So that the customs of London, for persons under one and twenty to bind themselves apprentices, doth not extend to Watermen; which was agreed by all. Then it was said the supposed apprentice here was no legal apprentice; if the indentures be not enrolled pursuant to the act of parliament of 5 *Eliz.* and if he were not a legal apprentice, the plaintiff had no title. But *Holt*, Chief justice, said, he would understand an apprentice, or servant, *de facto*, and that would suffice against them being wrong doers. *M. Cases* 69. *Barber v. Dennis.* P *350.

*15. In an action of trover and conversion of five oxen, the defendant pleaded not guilty, and by special verdict it was found, that one J. S. as bailiff to the defendant, took those beasts as for heriots due to the defendant, where there were not any due, and without any command from the said defendant the Viscountess *Montague*: But that afterwards she agreed thereto, and converted them; and after that the bailiff died. And, whether this action lies, or that he should have brought a general action of trespass was the question? And *Walmfley* and *Kingsmill* held, that this action lies not; for when the bailiff took them tortiously, the property is divested out of

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of the plaintiff, and the possession : So that he cannot suppose that he was possessed of them, until he lost them, and until they came to the defendant's hands. And the defendant by assenting to the taking is a trespasser *ab initio* ; as 28 *Aff.* 9. 28 *E.* 3. 18 & 40 *E.* 3. 20. are : Wherefore, where he might have had a general writ of trespass, he cannot have any other manner of action ; especially not this action, which differs from it in nature and quality : But *Anderſon* and *Warburton*, *contra*. They agreed, that an assent before or after the taking of the goods made her a trespasser *ab initio*, and to be punished as a trespasser. But not an assent after to a battery formerly done ; or to that which is a tort, and punishable by the statute-law, as an assent to a riot, or forcible entry after it is done, shall not make him punishable. But although trespass lies ; yet he may have this action if he will ; for he hath his election to bring either. And as he may have detinue or replevin for goods taken by a trespass, which affirms always property in him, at his election ; so he may have this action ; for one may qualify a tort, but not increase a tort. So he hath an election to make it a tortious taking or not ; which is the reason that if goods be taken by a trespasser, yet if the party for whom they were taken, be attainted of felony, he shall forfeit them ; or the right and property remains in him, and the law shall adjudge them in him, until he makes his election to the contrary, by bringing a writ of trespass ; wherefore he might maintain the one writ or the other at his election. Wherefore, &c. 1 *Cro.* 824. *Bishop v. Viscountess of Montague*. See *Show.* 81. *Parker v. Gage* ; and *Winch*, 46, 47.

16. An action of trover and conversion was brought, and upon the whole matter the case appeared to be this :

A stranger took the horse of the plaintiff, and sent him to a common inn, and there he remained for the space of half a year, at which time the plaintiff had notice where his horse was, and thereupon demanded him of the innkeeper, who answered, that a person unknown left the horse with him, and said, he would not deliver the horse to the plaintiff unless he would pay him for his meat which came to three pounds ten shillings for all the time, and also would be sure that it was his horse ; upon which the plaintiff demurred in law.

And it was resolved by *Montague*, Chief Justice, *Crooke* and *Doderidge*, justices ; (*Haughton* Justice dissenting) that the defendant's plea was good ; for the innkeeper was compellable to keep the horse, and not bound, at his peril, to take notice of the owner of the horse ; and by the custom of *London*, if a horse be brought to a common inn, where he has (as it is commonly said) eared out his head, it is lawful for the innkeeper to sell him ; which case of the custom implies this case. And there is a difference, where the law compels a man to do a thing, and where not ; as if the Lieutenant of the tower brings an action of debt for diet against one who

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was his prisoner: In this case the defendant cannot wage his law; because the law compels the Lieutenant to give victuals to his prisoner; otherwise if another man brings an action of debt for diet: And in this case at the bar the innkeeper was compellable. And *Doderidge* said, that if the law was as the plaintiff would have it it would be a pretty trick for one who wants a keeping for his horse. P * 351. And *Mich. 6 Jac.* in the king's bench, between *Harbo* and *Ward*, the like was resolved, as was cited by *Barkefeld*, of counsel with the defendant. *Popham* 127. *Robinson v. Walter*, S. C. 3 Bulst. 268, S. C. 1 Roll's Rep. 449. S. P. 3 Bulst. 289. *Stirt v. Drungold*, S. P. 1 Bulst. 170. *Skipwith v.* —

17. An action of trover may be brought for goods taken for the King's tax; if the taking were any ways unlawful; as if the party were exempt from the taxes, and the like. 2 Mod. 182. *Bell v. Knight*.

18. Trover lies to try the validity of the judgment of the commissioners of the excise, if for things over which they have no power; otherwise as it seems in things within their jurisdiction, and the proper remedy in such case is an appeal. See *Hardres's Reports*, 578, and 480.

19. Trover for six hogs, special verdict was found, viz. that the lands demised, lying in two counties, viz. part in the hundred of *A.* in *Wils.* and part in the hundred of *B.* in *Southampton*; the lessor for rent arrear distrained in both hundreds, and the distress being not replevied in five days, notice was given to the owner of the goods, and then he sent for the constable of *A.* who, in the presence of *B.* sold them in the hundred of *B.* Et per Cur. first, personal notice is sufficient; for notice is the thing required. 2dly, Notice to the owner is sufficient against him in trover; but if the tenant had brought replevin, that would not have served as to him, but he must have had notice also. 3dly, Though the act requires the oath should be administered by the constable of the hundred where the goods are, and here the constable of *A.* administered the oath in the hundred of *B.* where he had no authority, yet this was held good; because the defendant could not sever the distress, it being intire as the cause was, and the hundreds contiguous; so that the driving was lawful, and a continuance of the first taking. Sed per Cur. A distress in *Middlesex* ought not to be driven into a distant county, as *Hampshire*. 1 Salk. 247. *Walter v. Rumball*, S. C. 4 Mod. 390.

20. Trover for a ship, and its tackle and furniture. Upon not guilty pleaded, a special verdict was, that one *William Gault*, a denizen of *England*, was owner of the ship at the time of the taking, and was *Dutch*-built, and taken in the war between the *Dutch* and *French* as a *Dutch* prize, and condemned for prize in the court of admiralty of *France*, and sold; and that when the said ship was taken as prize, there was amity between *England* and *France*. That the master was a *Dutchman* born, but a denizen of *England*. The
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mate was *English*, and eight mariners, and two *Dutch* on board ; that the said ship was sold to divers persons by virtue of the sentence of the admiralty of *France*, and that the plaintiff bought the said ship from the persons to whom the same was sold as aforesaid ; that the defendants, as servants of the said *William Gault*, took the said ship from the plaintiff ; and if the defendants be guilty, &c.

The chief question intended was, whether this sentence shall be examined by the common law ? And resolved, it shall not ; because though it be in another King's dominions, we ought to give credit to it, or else they will not give credit to the sentences of our courts of admiralty, and the defendants are not prejudiced ; for the way is, if they find themselves aggrieved, to petition the King, who will examine the case ; and if he finds cause of complaint, will send to his ambassador residing with the prince or state where the sentence was given, and upon failure of redress, will grant letters of mart and reprisal ; and judgment was given for the plaintiff. *Raym.* 473. *Hughes v. Cornelius & al*

P * 352. 21. In trover for goods, on the twenty fifth of *November*, anno *tertio Caroli* : Upon not guilty, a special verdict was found, that one *John Hill* and *Alice Squire* was possessed of those goods, and used the trade of merchandize, and being so possessed, were bound to the defendant, anno *vicefimo primo Jacobi*, in a statute, acknowledged according to the * statute of *vicefimo tertio Henrici octavi*, capite *sexto*, for a true and just debt ; and that being forfeited, he sued an extent upon that statute, *vicefimo Octobris tertio Caroli*, directed to the sheriffs of *London*, and that they, by virtue of that extent *vicefimo primo Octobris tertio Caroli*, extended those goods, (the writ being returnable in *Crastino Animarum*) and returned the writ and inquisition into the chancery, that the third of *November*, 3 *Car.* the said *John Hill* and *Alice Squire* became bankrupts, being indebted to the plaintiff, and to divers others, for true and just debts. That upon the sixth day of *November* 3 *Car.* the defendant sued a *Liberate* upon that extent, and those goods the same day were delivered by the sheriffs according to the appraisement in the extent ; that afterwards, viz. upon the eighth day of *November*, the plaintiff, and others, sued out the commission of bankrupts against the said *Hill* and *Squire*, and the commissioners, by virtue of their commission, sold those goods to the plaintiff upon the three and twentieth day of *November*, 3 *Car.* and that the defendant afterwards, viz. the twenty-fifth day of *November*, the same year, converted them, &c. *Et si super totam &c.* And it was argued several days at the bar, and the sole question was, whether *John Hill* and *Alice Squire* becoming bankrupts after the extent, and before the *Liberate*, the sale of the commissioners unto the plaintiff, after the goods delivered upon the *Liberate*, be good ? And it was argued by *Noy* and *Farrer* for the plaintiff, that this sale is good ; for notwithstanding this extent, the property of the goods remain in the consors, and by the extent

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extent are only seised into the King's hands, but that shall not divert any property from the conufors ; for they be as it were in the protection of the King, and then when the conufors become bankrupt before the *Liberate*, those goods are in the power of the commissioners to sell and distribute amongst the creditors ; and they relied especially upon the book of 3 *Ed. 6. Dyer* 67. where goods be extended, yet were subject to be seised for the King's debt : And they also relied upon the statute of 13 *Eliz. c. 7.* and chiefly upon the statute of 21 *Jac.* whereby it is provided, that commissioners may sell goods or lands, notwithstanding judgments, statutes, executions, or extents, not served or executed ; and that, they said, was not done until the *Liberate* ; otherwise there would be a mischief : For then there may be an extent, and no *Liberate* be sued after upon it, as the book of 31 *Hen. 6. Brooke* statute 41. But all the court resolved, and severally delivered their opinions, that those goods, extended before they became bankrupts, and delivered by the *Liberate* after they became bankrupts, could not be sold by the commissioners ; because they being extended, are *quasi in custodia legis* ; so as the conufors have not any power to give, sell, or dispose of them ; and although by the extent the conufee hath no absolute interest nor property in them, until the delivery by the *Liberate*, and at the return of the writ, may refuse them for being overvalued, yet that is for the advantage of the conufee : For the extent is *Capias in manus nostras, ut eas liberari facias*, and they be as goods gaged or distrained, which cannot be forfeited by outlawry, or taken in execution from the party who hath them in gage, or by way of distress, without payment of the money. *Vide* 37 *Hen. 6. f. 10. 22 Ed. 4. f. 11. 3 Hen. 8. Bro. Pledge* 28. and 13 *Rich. 2.* For the goods are bound by the execution sued, but the land is bound by the judgment, and by the extent they are to be taken by the conufee ; and it is good against the conufor : And the case here is stronger ; for that the extent is returned before they became bankrupts, and the delivery by the *Liberate* was before the commission of bankrupts was sued out ; and it was adjudged for the defendant. 3 *Cro. 148. Audley v. Halsey.*

*22. The assignees of the commissioners of bankrupts may bring P * 353.
trover for goods sold by the bankrupt, after the awarding the commission ; and the sale is void, though the goods were never seised. *Moor* 594. *Smith v. Miles, S. C. 2 Co. 25.*

23. In an action of trover and conversion, by the administrator of serjeant *Davis*, for divers jewels : Upon not guilty pleaded, the jury found for part not guilty ; for other jewels, that he is guilty ; and for sixty-five great pearls, and sixty-five small pearls, and a diamond chain, they found a special verdict ; that serjeant *Davis* was possessed of them, and being possessed, made his will, and thereby devised the use and occupation of all his plate, hangings and jewels,

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jewels, to dame *Eleanor*, his wife, during her widowhood, she giving good security to my daughter *Lucy*, Lady *Hastings*, to deliver and leave the same to my said daughter *Lucy*, at the day of her death or second marriage, which should first happen. That he died possessed of those jewels and that after his death, the administration of the goods of the said serjeant *Davis* was committed to the plaintiff; that the said *Eleanor*, the wife of Sir *John Davis*, was the daughter of the Lord *Audley*, Earl of *Castlehaven*; and that she in the life of Sir *John Davis* used the said jewels, *Et ut ornamenta corporis sui* usually wore them; then afterwards the said *Eleanor* married with the defendant, and that he converted those jewels, &c. And if the court shall judge for the plaintiff, they find for the plaintiff, and damages 370*l.* and if not, for the defendant. Upon this special verdict, it was openly argued at the bench, and some nice points, arising in this case, I thought it proper to recite the judges arguments: And *Berkley* and *Jones* argued for the defendant, that she being the daughter of a nobleman, and permitted to use them frequently, *ut ornamenta corporis sui*, and they being convenient for her degree, she could have them as her *paraphernalia*; and when there be not debts to be paid, (as it doth not appear there were any) she shall have them against the executors or administrators of her husband; and that the husband cannot dispose of them from his wife, by his will; but instantly, by his death, the possession of them being in the wife's custody, the property is immediately vested in her, and the husband cannot give them away; and that is of necessity and for conveniency in the law; for it is not reasonable the husband should leave her naked of those jewels which she usually did wear, and are fit (according to her calling) to wear: And it appears by *Lynderwode*, that the wife against her husband's will, hath such an interest in goods which are her *Paraphernalia*, that her husband hath nothing to do with them; but she may make a will of them in her husband's life-time, and may dispose of them, *in vita mariti, invito marito*; but they said, this is not allowable in our law, that she should dispose of them in her husband's life time; but when the husband doth not dispose of them, they are instantly vested in the wife: And although the husband may make a gift of them in his life-time, yet he cannot make a will to dispose of them, &c. and compared it to the case, where a feme hath a term, and takes baron, he may give and dispose thereof in his life-time, but he cannot dispose of it by his will; as in the case of *Barnshy* and *Graham*, and the case of *Bracebridge*, *Plow.* 416. and in the case *primo Henrici quinti*, executor 108. the King may give the jewels of his crown by letters patents; but he cannot by his testament dispose of them. And *Berkley* said, that this permission of the wife to wear them usually, is as a gift of them to her by her husband; and compared it to the case of 11 *Hen.* 4. 83. where one takes my son and clothes him, or my wife and clothes her; it is as it were a gift of the said

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said apparel unto them, and I may take them again with the apparel: And as by the custom of *London* and *Wales* (as *Jones* said) the wife shall have the moiety of the goods, whereof her husband dies possessed; yet her husband in his life-time may give all the goods, but by his will he cannot prejudice her, * concerning her part; wherefore he concluded, that she should have them notwithstanding the will. And *Jones* said, that by the civil law, as the condition to tie her from marriage, so the limitation to have these jewels during her widowhood, is void, because she is absolutely possessed of them; whereupon they concluded, that judgment ought to be given for the defendants. But *Richardson*, Chief Justice, and *Croke*, argued to the contrary; and that this is a good will; and that she may not take them but according to the will: But if the husband had not made a will, but had left them to the disposition of the law, and the question had been betwixt the executors or administrators, and the wife, where there be not any debts and legacies besides those jewels; there, peradventure, the law will allow her to take and enjoy them as her *Paraphernalia*. But where a husband hath made a will and limited how she should have them, she ought to take them as her husband appointed; and his will is as good, and as well to be performed, as a gift in his life-time; and that it is not like unto the case of 11 *Hen. 4.* 83. for there it is a good gift to the son, and to the feme, by the ravisher; and the husband may well assent unto them. So are the cases 11 *Hen. 4.* 12. and 34 *Hen. 6.* 10. That goods dedicated to the service of a chapel or a church, are a good gift to the wardens of them in law; but this permission by the husband for the wife to wear them, cannot be a gift of them in deed nor in law; for the husband cannot give any thing to the wife, they being both but one person in law. And as to the objection, that although an husband may dispose of them by act in his life, yet he cannot by his will; it was answered, true it is, that a man who hath a thing real in another's right, or a chattel personal in another's right, although he may give, yet he cannot devise it, as *Plow.* 192. in *Bracebridge's* case. So where an executor makes a gift of goods, which he hath as executor, it is a good gift; but a devise of them is not good, because he hath them *in auter droit*. But of all chattels personal, although the wife had them before marriage, the absolute property by the marriage is vested in the husband, and he may give them in his life, or dispose of them by his will: So of those goods which are termed *Paraphernalia*, the absolute property is in the husband; and therefore he may well devise them. And to the cases, that the husband may by gift of all his goods, *bona fide*, prevent his wife that she shall not have any part of them, notwithstanding the custom in *London*, *Wales*, or elsewhere; yet by his will, if he deviseth them, it shall not frustrate what she ought to have by the custom, they agreed to be good law; for the custom is another law, and instantly by the death of the husband

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husband vesteth the interest in the wife ; but the goods which she claims as *Paraphernalia* be not given to the wife, but those which are of necessity and conveniency for her : And when the husband leaves her what is for her necessity, *viz.* necessary apparel, he may well make a disposition of the residue, by his will ; and for that purpose was cited 19 *H. 6.* 14. a feme for her quarentine may have her living *de communi* ; but she may not take any thing, unless for necessity. And where the civil law saith, that she may make a will in the life of her husband of her *Paraphernalia* ; yet the common law (whereby we are to be guided) is expressly contrary to it ; that she may not make a will of any goods but with her husband's assent ; and that the husband should assent afterwards, and deliver the goods according to her will ; for then it is as his own gift : But of an obligation or things in action, a wife may make executors by assent of her husband, and may make her husband executor, as appears by the books 4 *Hen. 6.* 31. 39 *Hen. 6.* 27. 3 *Ed. 3.* *Devise* 12. 26 *Ed. 3.* 71. And the interest, and possession, and property of such goods as are called *Paraphernalia*, are in the husband, and he may devise them to his wife ; and that she shall

P *355. take them by the devise, appears 33 *Hen. 6.* 31 * where he devised to his wife her apparel ; and she justifies the taking of them by the devise and delivery of the executor. 37 *Hen. 6.* 28. that she ought to take only her necessary apparel. 1 *Eliz. Dyer.* 166. 18. *Ed. 4.* 11. 12 *Hen. 7.* 33 & 34. that the property and possession of those goods be in the husband, and she may not make a will of them without her husband's assent. And a case was cited in the exchequer. *Trin.* 28 *Eliz.* betwixt the Lord Treasurer and others, executors of viscount *Bindon*, against *Mary Viscountess Bindon*, in an action of trover and conversion of jewels, of the value of 1000l. she pleads to all, besides such jewels, which were a chain and bracelets, not exceeding the value of 160l. not guilty ; and as to them, she pleads, that she was the wife of Viscount *Bindon* at the time of his death, and she usually wore jewels, as ornaments of her body ; and avers, that the executors had assets to satisfy his funerals, and all his debts and legacies, besides those goods : So there it is to be observed, that the jewels of 160l. for a viscountess, were not allowable for *Paraphernalia*, if he had disposed them in legacies. And it was answered, although here in this case, the defendant be the daughter of an ancient baron of this realm, and of an Earl in *Ireland*, yet being married to serjeant *Davis*, she ought to have them as his wife : And there is not any necessity she should have a chain of diamonds, and the said sixty-five great pearls, and the sixty-five small pearls, which are things hanging loose, are not in any chain or bracelets ; and they be not for any necessity for ornament or for covering. But *quacunq; via data*, the husband having expressly disposed of them by his will, she may not against his will take them without the assent of the administrator, and without delivery, and
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not of her own head detain them, without entering security : And where it is alledged, that in the civil law a condition to restrain a second marriage, is not allowed ; this is no condition, but a limitation only ; and it is reasonable she should take accordingly. And it was alledged, that this is not any devise of those jewels, but only the use and occupation of the plate, hangings, and jewels, during her widowhood, (which may be) and no absolute gift of them ; as is in 37 *Hen. 30.* the case of *Craple and Plowd.* in *Welden's* case : And they concluded, that this is a good disposition by the will, and a declaration of his intent, and takes away that which otherwise she might claim by the law ; and his express declaration controls any implied gift, as it is pretended. And for as much as she hath not performed it, the limitation is determined, and neither she nor her husband can have them ; wherefore they concluded for the plaintiff. 3 *Cro.* 343. *Lord Hastings v. Sir Archibald Douglass.* See *Moor's Reports* 213. *Viscountess of Bindon's* case of *Paraphernalia.*

24. In trover for goods the case was thus : The goods were distrained by the defendant for rent, which he claimed as occupant, and the court resolved, that the action lay, and that there could be no occupant of a rent. *Yelv. Salk. Bulst. S. C.* 1 *Cro.* 901. *S. C. Moor* 664. See *Vaughan* 186.

25. In a special verdict in trover and conversion, the case was this, viz. *H.* being possessed of several sheep, sells them in a market to *A.* but did not deliver them. And afterwards in the very market they discharged each other of this contract, and a new agreement was made between them ; which was, that *A.* should drive the sheep home, and depasture them till such a time, and that at the end of that time, *H.* would pay him so much a week for their pasture ; and if at the end of that time, *A.* would pay *H.* so much for his sheep, then *A.* should have them.

Before the time was expired, *H.* sells the sheep to the plaintiff *Mires*, and afterwards *Alston* sells them to one *Marwood*, who brought a replevin against the plaintiff for taking the sheep : and the officers, together with **Solebay* the defendant (who was servant to *Marwood*) did by his order, and in assistance of the officers, drive the sheep to *Marwood's* ground, where they left them.

The plaintiff demands the sheep of *Solebay*, and upon his refusal to deliver them, brings this action against the servant ; and whether it would lie or not ? was the question. It was argued at the bar, that the action would not lie against the defendant, because he had not the possession of the goods at the time of the action brought ; for he presently put them into his master's ground : And it was said, if *A.* find goods, and *S.* takes them away before the action brought, trover will not lie against *A.* but it is otherwise, if he sells them.

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In this case it would have been a breach of trust in the servant to have delivered the goods belonging to his master, to another ; it is true, if there be a conversion, though the possession be removed before the action brought, yet the action will lie ; but that is because of the conversion.

Many cases were put where the servant is not liable to an action for any thing done by the command of his master ; and where a bailiff, who is but a servant to the sheriff, shall not be charged in a false return made by his master. *Cro. Eliz.* 181. So if a smith's man prick an horse, the action lies against the master, and not against the servant.

The court, before they delivered any judgment in this case, premised these two things ; *viz.*

1. That it is necessary in trover to prove a property in the plaintiff, and a trover and conversion in the defendant. And it was said by justice *Atkyns* (but denied by the chief justice) that though goods are sold in a market, yet the property is not changed till the delivery ; for which he cited *Keilw.* 59, 77.

But the court held clearly in this case, that the first sale to *Alstone* was defeated by the agreement of the parties afterwards ; for when a bargain is made, and all the parties consent to dissolve it, and other conditions are proposed, the new agreement destroys the former bargain. And the chief justice said, that if an horse was bought in a market, for which the vendee is to pay ten pounds, if the ready money be not paid, the property is not altered, but the party may sell him to another.

2. This new agreement to have the sheep, if *Alstone* would pay such a sum of money at a future day, will not amount to a sale, and the property is changed ; and consequently the sale by *H.* to the plaintiff, before the day, is good ; and so the property is in him. But by the opinion of the whole court, the action would not lie against the defendant.

1. The defendant could not be guilty of a conversion, unless the driving of the cattle by virtue of the replevin would make him guilty ; but at that time the sheep were *in custodia legis*, and the law did then preserve them, so that no property can be changed ; and if so, then there could be no conversion.

2. The action will not lie against the servant ; for it being in obedience to his master's command, though he had title, yet he shall not be excused ; and this rule, justice *Scroggs* said, would extend to all cases where the master's command was not to do an apparent wrong ; for if the master's case depended upon a title, be it true or not, it is enough to excuse the servant ; for otherwise it would be a mischievous thing if the servant upon all occasions must be satisfied with his master's title and right before he obey his master's

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ter's commands; and it is very requisite that he should be satisfied if an action should lie against him for what he doth in obedience to his master; but it was said, the servant cannot plead the command of his master in bar of a trespass; and it was likewise said, that in this case, the driving of the cattle to the grounds of his master, or a stranger helping to drive them without being requested, is justifiable. P * 357.

3. Because what was done by the defendant was done in execution of the process of the law, and he might as well justify it as the officer; for he had forbid the defendant to have assisted him, yet his assisting him afterwards would not have made him guilty, because done in execution of law.

4. Because it is not found that the servant did convert the sheep to his own use; for the special verdict only finds the demand, and the refusal, which is no conversion; and though it is an evidence of it to a jury, yet it is not matter upon which the court can give judgment of a conversion. 10 Co. 57.

And therefore the jury should have found the conversion, as well as the demand and the refusal, like the case in 2 Roll's Abr. 693. in an assize of a rent-seck; upon *nul tort* pleaded, the jury found a demand and refusal, & *sic disseisavit*; it was held to be a good verdict; for the demand ought to have been found on the land, and shall not be so intended unless found.

The plaintiff here hath set forth in his declaration a request to deliver; then a refusal and conversion too, which shews that they ought to be found, because distinct things; and the finding the demand and refusal was only a presumptive, not a conclusive, proof of the conversion; and if the jury themselves knew that there was a conversion, yet the plaintiff hath failed in his action; as if a trover be brought for cutting trees, and carrying them away, and the jury know that the defendant cut them down, yet they still lay in the plaintiff's close; this is no conversion.

And though it hath been strongly insisted at the bar, that the court shall intend a conversion, unless the contrary appeared, and are to direct the jury to find the demand and refusal to be a conversion, and the opinion of *Dodridge* and *Croke*, in *Roll's Rep.* 60. was much relied on, where *Adams* recovered against *Lewis* 40 l. in the court of *Exon*, and three butts of sack were taken in execution, and the plaintiff deposited 22 l. in the hands of the defendant to prevent the sale of the sack, which was to be a pledge to return it upon request, if the defendant was not paid before the next court-day; the jury found the debt was not paid, and that no request was made to return the sack, but that the plaintiff requested the defendant to return the money: yet it was held by those two justices, That the law would supply the proof of a conversion, though it was not found; for it shall be presumed that the money was denied to the plaintiff, and that the defendant might use it himself;

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himself; and because no other proof could be made, that very denial shall be a conversion in law; so a denial of a rent seck after demand, is a disseisin; much more in personal actions, where the substance is found, it is well enough. 1 *Inst.* 282. a.

But the court said, that notwithstanding the authority of *Roll's Rep.* 60. 1 *Institutes* 282. They would not intend a conversion, unless the jury had found it specially in this case, because they ought to have found it to make the servant liable; for if the conversion was to the use of the master, there is no colour for this action to be brought against the defendant, but it ought to have been brought against the master.

Whereupon a *venire facias de novo* was prayed, to help the insufficiency of the verdict, the conversion not being found; but the court said, it was to no purpose to grant a new trial, unless the plaintiff had a new case; and so judgment was given for the defendant. 2 *Mod.* 242. *Mires v. Solebay.*

P *358. *26. In trover and conversion of divers quarters of malt, the case upon the evidence was, that the defendant having a great quantity of malt in a vessel, impowered one *Smith* a broker, to sell it; and afterwards the defendant himself sold it to a stranger; and the same day, and before notice of the sale by the defendant, *Smith* sold it to the plaintiff, who demanded it of the defendant, who denied it: and the case was doubtful to *Rolle*; for if the defendant's sale should stand against the sale of *Smith*, before notice of the first sale, then should he be chargeable for his bargain, which he could not perform, without any default in him. And on the other side, it were hard that the sale of the owner, who had the absolute property of the goods, should be defeated by a subsequent sale of him that had but a bare authority. But in the conclusion he declared his opinion, that the sale of the defendant should stand good, and the broker ought in each case to make his sale conditionally, if the master had not sold it before; but he said neither the broker, nor his vendors should be liable to any action for detaining the goods, though demanded, without notice given of the sale by the master. *Allyn* 94. *Alwin v. Taylor.*

27. In trover for letters patent of wine license, after a verdict for the plaintiff, it was objected, that letters patent are a record, and that there cannot be a conversion of a record; but the court held, that the letters patent in the declaration, are only an exemplification of those under the great seal; for which trover may be brought, and they may be converted. 3 *Salk.* 367. *Anonymus.*

28. It lies for a spaniel, but not for an hawk, unless reclaimed; and the reason is for want of property. 3 *Salk.* 365. 1 *Mod.* 243.

29. It lies for money, though out of a bag; for the action is not to recover the money, but the damages. 3 *Salk.* 365. *Cro. Eliz.* 89.

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30. Where *A.* and *B.* agree upon a price for goods which are marked, and *A.* promises to deliver them to *B.* paying so much money for them; *B.* tenders the money, and *A.* refuses to deliver the goods; it was adjudged by *Holt* chief justice, that it was a bargain for the goods; and the plaintiff, upon a tender of the money, might have brought a trover for the goods. *Comb.* 381. *Anonymus.*

31. It was a question in the case of *Darlington v. Hanson*, in *Com.*

333. Whether an action of trover might be joined with an action against a carrier, upon the custom of the kingdom, for his negligence in losing goods; there was no judgment given, but the court inclined for the plaintiff; and the cases cited by *Darnel* and *Northy* for the plaintiff, was a case in *Trin.* 24 *Car.* 2. *B. R. Owen v. Lewis*, where trover, and an action upon an *assumpsit* were joined; and upon infancy being pleaded, it was said to be adjudged, that these actions might be joined. 3 *H.* 4. 13. *Bro.* Joinder in Actions, 97. *Syd.* 223. *Wright v. Berle.*

32. This action lies not for a negro, *Salk.* 666. but it lies *de uno scripto obligatorio.* *Salk.* 654.

33. It is said in *Salkeld* 655. in an *anonymus* case, that an action of trover lies not against a carrier for negligence, as for losing a box; but it must be where there is an actual wrong; as if he breaks it open, and takes goods, or sells the box.

34. It lies not for six runs, without describing what they contain; for if it is meant of empty runs, they ought to be called six wooden vessels, each containing a run measure. *Stile* 482.

35. See in what case the property shall be said to be altered by a sale in *market overt*; so that trover may, or may not be brought against him who hath the property by such sale. *W. Jones* 163, 4. *Earler v. Reading.*

36. Where it was held, that trover will lie for money delivered by the plaintiff to the defendant to keep, though not in bags. *Popham* 91. **Davies v. Dyos*, *Godb.* 210 — *Noy* 12, *Anonymus*, the P *359. same point. And it is reported in the last case, that where a master delivers corn to his servant to sell, and does so, and converts the money, the master may bring an action of trover against the servant. *Allen* 91. *Moor.* 841. 2 *Bulst.* 307. 1 *Roll's Rep.* 59, 126.

37. It was said in the case of *Sir John Walrond v. Jacob Senior Henricus Van Moses*, that the Lord Chief Justice *Holt* was of an opinion, an action of trover would lie in England for a conversion in Ireland. *Mod. Cases in Law and Equity* 322.

38. See in the case of *Monk v. Graham*, in *Modern Cases in Law and Equity*: where trover was brought for 750 l. *South Sea* stock, sold to the defendant by one *Rosse*, who got one to personate the plaintiff in the transfer, and the plaintiff had a verdict.

39. It was said in the case of *Jones and Thurlow*, by the chief justice, as reported in *Modern Cases in Law and Equity* 172. That an innkeeper might detain a horse for his meat for one night; yet

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that he could not sell the horse and pay himself; if he did, it was a conversion; and the court held that if a man lies in an inn one night, the innkeeper may detain his horse, till he is paid the expences; but if he lets him depart without payment, he gives him credit, and hath waved the benefit of the custom; and if he seizes the horse for the expences of several nights, having let him thus depart, an action of trover will lie, and it is evidence of a conversion.

40. Where the defendant comes to the possession by finding, in such case a denial is a conversion; but where a man hath goods by a delivery, there a denial is no conversion, 1 *Salk.* 635. but only evidence of a conversion; now in both cases the defendant had a lawful possession, viz. either by finding, or delivery; and where the possession is lawful, the plaintiff must shew a demand, and a refusal to make a conversion. 3 *Salk.* 365.

41. But if the possession was tortious; as if the defendant takes away the plaintiff's hat, there the very taking is a sufficient proof of the conversion. 3 *Salk.* 365.

42. Trover will lie for 290 pieces of silver, and likewise for plate. 1 *Salk.* 219. *Stile* 224.

43. Trover and conversion will lie for letters patent. *Hard.* 111.

44. Likewise for a bill of exchange. 1 *Salk.* 136. *Lucas v. Haynes.*

45. In an action of trover upon a special verdict, the case was, the goods in the declaration were the plaintiff's, and by him delivered in London, to one *Richardson*, to carry down to *Birmingham*. This *Richardson* was not a common carrier, but for some small time, last past, had brought cheese to London; and in his return took such goods as he could get, to carry back in his waggon into the country for a reasonable price. When he returned home, he put the waggon, with the cheese, into the barn, where it continued two nights and a day, and then the landlord came and distrained the cheese for rent due for the house, which was not an inn, but a private house: and it was agreed *per Cur'*, that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from a distress for rent; but this being a private undertaking, required a further consideration; and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier. And the case in *Cro. El.* 596. is stronger: two tradesmen brought their wool to a neighbour's barn, which he kept for his private use; and it was held, that could not be distrained. 1 *Salk.* 249. *Gifbourn v. Hurst.*

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*46. In an action for trover and conversion, brought for two P *360
hundred and fifty pounds of hops, upon Not guilty pleaded, the
case appeared to be, that a feme, tenant for life, takes to husband
the plaintiff, 5 *Car.* the remainder being to the defendant for his
life. These hops were growing out of antient roots, being within
the lands in question: the feme dies 19 *Aug.* 9 *Car.* the hops then
growing, and not severed, &c. and whether these hops appertained
to the baron, or to him in remainder? was the question; because
she died so shortly before the gathering of them; and as they are
such things as grow by manurance and industry of the owner, by
the making of hills, and setting poles. And the court, upon the
motion of *Grimston*, who was of counsel with the plaintiff, held,
that they are like emblements, which shall go to the baron or exe-
cutor of the tenant for life, and not to him in remainder; and are
not to be compared with apples or nuts, which grow of themselves;
wherefore it was adjudged for the plaintiff. 3 *Cro.* 515. *Latham*
v. Atwood.

47. In an action on the case for a trover and conversion of cer-
tain timber-trees: the case and question was, as touching the power
of a copyholder for life, for the cutting down timber-trees; and
whether such a copyholder may prescribe by the law for to cut
down timber-trees, growing upon his copyhold land, or not? *Noy*,
for the plaintiff, argued that he cannot. *Williams* justice, such a
copyholder for life cannot prescribe for to cut down timber-trees
growing upon his copyhold-land; and to this purpose, in *Luttrell*
and *Wood's* case in the *C. B.* it was adjudged in point, that a copy-
holder for life cannot prescribe to cut down timber-trees, but by
way of usage he may for reparations. And as touching usage and
custom, it appeareth, in 21 *E. 4. fo.* 28. *b.* that usage and custom
to turn their plow upon the headland not sowed with corn, is good;
but there it is said by *Littleton*, that a prescription against reason is
not good; as if a custom be alledged, that none shall put his cattle
into his land before the lord do put his cattle in; this is held to be
a void custom, because it is against reason; for if the lord will
never put in his cattle, the tenants by this will lose the profit of
their soil: but otherwise it is where a day is limited; and to this
purpose, 22 *E. 4. fol.* 8. *A. B. pla.* 24. And that a prescription
which is against reason is void, and shall not be allowed by law.
See for this *Littleton*, *fol.* 46. *pla.* 209. and *pla.* 212. and 5 *Hen. 7.*
fol. 96. and 10 *a.* In this principal case here the clear opinion of
the court was, that this prescription here for a copyholder for life
to cut down timber-trees, was a prescription against reason, and so
void in law; and so was the opinion of the whole court; but no
judgment was then given. 1 *Bulst.* 158. The Earl of *Northum-*
berland plaintiff, against *Wheeler* and others, defendants.

48. In an action of trover for 100 loads of wood, upon a special
verdict the case was, this copyhold-land was surrendered to the use

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of *J. S.* for years, remainder to the brother of the plaintiff's wife, who died before the term expired ; and so was not admitted any otherwise, than by the admission of the tenant for years ; and it was resolved.

First, That the admittance of him that had the estate for years, was not an admittance for him in the remainder. 4 Co. 23. *A. 3 Cro. 504.* Fine *sur* grant and render to *A.* for life, remainder to *B.* execution sued by *A.* serves for *B.* So an attornment to tenant for life serves for him in remainder, and this brings no prejudice to the lord ; for a fine is not due until after admittance ; and the lord may assess one fine for the particular estate, and another fine for the remainder. But *Wylde* said, he need not pay it until his estate comes in possession. After a surrender the estate remains in the surrenderer before admittance of the *cestuy que use* : yet where *Borough English* was surrendered to the use of *J. S.* and his heirs, and he died before admittance, it was held, that the younger son should have it.

P * 361.

Secondly, It was resolved, that the possession of the tenant for years was so the possession of him in remainder, as to make a *possessio fratris*. But then it was moved, that the conversion was laid after the marriage ; and so the feme ought not to have joined with her husband in the action. But the court held, that in regard the trover was laid to be before the marriage, which was the inception of the cause of action, the wife might be joined ; as if one has the custody of a woman's goods, and afterwards marries her, she may join in detinue with her husband ; for in case of bailment the proprietor is to some purposes in possession, and to some out of possession. *Hale* said in this case, the husband might bring the action alone, or jointly with his wife ; and so judgment was given for the plaintiff. 1 Vent 260. *Batmore & Ux. v. Graves.* S. C. 1 Mod. 102.

48. In trover for twenty loads of hay ; upon Not guilty a special verdict was found, that this hay was parcel of the tithes, severed from the nine parts, pertaining to the rectory of *Hackley*, and demised and demiseable time, &c. *secund. Consuetud. Manerii de Hackley*, and the prior of *Newbery* was seized in fee of the manor and rectory of *H.* and in 27 H. 8. demised those tithes by copy to *H.* under whom the defendant claimed ; and afterwards, by the dissolution, &c. the manor came to king *H. 8.* who conveyed it to the archbishop of *York*, who let the rectory to the plaintiff, who claimed those tithes ; and the defendant, under pretence of that copy, carried them away. *Et si &c.* The sole question was, whether those tithes were grantable by copy, &c. And it was moved for the plaintiff, that they were not ; first, in respect of the nature of tithes, wherein none could have propriety before the council of *Lateran*, which was in the time of King *John* ; for before that time every one might have paid them to whom he pleased ; but

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but by those constitutions, they are annexed to the rectory; it is then impossible that there should be any custom to demise them by copy, from time, &c. whereas none had interest in them but within time of memory. Tithes also cannot pass but by deed; and therefore to grant them by copy of court-roll, cannot be good. There cannot also any thing pass by copy, but that which is parcel of the manor, wherefore, &c. And of that opinion was *Popham*, for the first and last reasons; for although common, and *prima vestura prati*, may be granted by copy, because they be parcel of the manor; yet tithes cannot be so, because they cannot be parcel of a manor; for a manor and tithes are of several natures, although they be united in one man's hand; and then it is impossible, that that which is not parcel of a manor can be demised *secund' Consuetud' Manerii*; and therefore it was adjudged, in the time of *Queen Mary*, in the case of the Duke of *Suffolk*, that where one had two manors, and granted a copyhold of the one manor, at the court of another manor, that it was a void grant; for it cannot be a copyhold, according to the custom of the manor whereof it is not parcel. But *Garody* doubted thereof, and conceived it had been well enough, if it had been so used from time whereof, &c. But, because upon the verdict it did not appear, that it had been granted by copy from time whereof, &c. it was held, that there was not any title found for the defendant; and therefore adjudged for the plaintiff. 1 Cro. 814. *Sands v. Drury*. See *Yelv.* 42. *Chambers and Mason*. 1 Bulst. 120. *Pultney v. Marfe*. Pal. 104. *Embden v. Dennis*. Latch 176. and 184. *Bellamy v. Bathorp*. S. C. Noy 89. S. C. Godb. 373. *Hardr.* 381. *Ingoldsby v. Yvel & al.* 3 Lev. 365. *Wharter v. Lestres*.

*49. In an action of trover, upon a demurrer, the case was, the P *362. plaintiff being owner of the rectory of *Evingham* in the county of *Northumberland*, brought his action of trover for twenty loads of wheat in *Harlow*, being the tithes of the rectory, set out from the nine parts. The defendant pleaded, that *Harlow* was a member of the manor of *Pridhoe*, both which are within the parish of *Evingham*, and conveys the manor to the Earl of *Northumberland*; and prescribes, that the Earl of *Northumberland*, and all those, whose estate he had in the same manor, from time whereof, &c. had paid to the parson of *E.* six pounds annually, in satisfaction of all tithes within the same manor; and further, that the said earl, and all those whose, &c. had used to have in respect of the said six pounds, the tenth part of all the corn within the said manor; and so these tithes within the said manor being severed from the nine parts, he took by title under the said earl. And it was thereupon demurred, and argued for the plaintiff, that this was not any plea; for a layman is not capable of tithes, and therefore no continuance of time can give him any title to that, whereof he is not capable; for by the antient course of our law, he cannot sue for them; and the

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the civil law did not permit a man to sue for them there; and so he had not any remedy, and therefore not any right. Also none can prescribe in a thing in gross, *per que estate*; and here he prescribes as for a thing in gross; and he cannot prescribe as to a thing appurtenant to a manor; for a spiritual thing cannot be appendant to a temporal; and for that purpose cited a case to be ruled in this court betwixt *Shirwood* and *Winchcomb*. 39 *Eliz.* wherefore, &c. But all the court, upon the first motion, resolved to the contrary, that it is a good prescription; that when the lord hath used from time, whereof, &c. to pay this sum, &c. and in respect thereof to have all the tithes within this manor, it shall be intended, that at the beginning the lord had all in his hands, and then might prescribe to pay a sum in discharge of all the tithes within the manor; and when he gave the tenancies to hold of him, and always afterwards used to have the tithes of those lands and tenements; it is a very reasonable prescription; for now he hath no more than what he had before; for he had them before by retainer, and now he takes the tithes themselves. And *Garudy* said, it may be true, that the parson before time of memory granted those tithes to the lord of the manor, rendering rent, which was confirmed by the patron and ordinary; and this being before time of memory, may well be so intended. *Quod Popham concessit*, and said, that that was their principal reason of the judgment between *Pigot* and *Hearn*. And they said, that in this case the lord might have good remedy at the common law, or in the spiritual court; wherefore they intended to have adjudged it for the defendant. But then an exception was taken to the pleading, that the conversion was supposed 10 *Sept.* 40 *Eliz.* and the defendant saith, that he found them the 20 *Sept.* 40 *Eliz.* and converted the 10th of *Sept.* which is repugnant in itself, which the court held incurable. *Vid.* 1 & 2 *Ph. & Ma. Dyer* 3. 1 *Cro.* 763. *Pigot v. Simpson* and others.

50. Trover for goods tried at the bar by a jury of *Kent*; upon the trial the case was thus:

The Earl of *Winchelsea* in the month of *August*, 1689, made his will, and thereby devised to the plaintiff all his personal estate to pay his debts, &c.

The will was proved:

But immediately upon the death of the earl, and before he was buried, the defendant who was married to the eldest son of the said earl, took possession of the house and goods in the declaration mentioned.

P* 363. *The plaintiff produced the will under the probate, then she proved that the goods were appraised at 1800 l. she produced an inventory of them, and proved that they were the same contained in the declarations, she likewise gave evidence of the conversion.

The defendant produced a deed of gift of these goods made by the earl in the year 1650, *habendum* to the trustees therein named for

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for the use of his then lady (but since dead) for the term of her natural life, and afterwards that they should be and remain to his children.

The counsel for the plaintiff admitted, that though the same goods for which this action is brought, were likewise contained in the deed of gift, yet that deed could not be good against a creditor.

That the earl being in debt a judgment was obtained against him, and by a *testatum fieri fac.* his goods were taken in execution, and sold by the sheriff in *Hillary* term 1657, for 800 l. which was after this deed of gift.

It was proved that his steward paid the money, and redeemed the goods, and the earl gave him a bond for repayment, which was done, and the bond cancelled; so by this means he had gained a new property. A copy of the *testatum fieri fac.* was produced, and likewise the bill of sale by the sheriff, and the bond cancelled, and thereupon the plaintiff had a verdict. 4 *Mod.* 51. The countess of *Winchelsea* against the Lady *Maidstone*.

51. An action of trover and conversion was brought against a bailiff for taking goods by virtue of a *feri facias*; and the question was, whether the bailiff, it appearing that he took the goods by virtue of a *feri facias*, could be said to be guilty of a conversion to his own use, admitting that the goods were not subject and liable to the said execution; and it was adjudged for the defendant. 2 *Syd.* 271. *Baily v. Bunning*, S. C. 1 *Lev.* 173.

52. In trover the plaintiff declared, that he was possessed of divers goods, viz. of fifty pieces of gold, coined within this kingdom, *ac de viginti petrat. carnis bovinae*, (*anglice*, twenty stone of beef) *ac de viginti vasibus*, (*anglice*, wooden vessels) as his proper goods, which he lost, *quæ quidem bona & catalla postea apud* such a place, *ad manus & possessionem* of the defendant *per inventionem* debuerunt.

There was a verdict for the plaintiff, and entire damages given. And now it was moved in arrest of judgment, and these exceptions were taken:

1. He hath declared, that he was possessed of fifty pieces of gold coined within this kingdom, but doth not name what money it was, for which reason it is uncertain; for pieces of gold are coined here of several values.

2. That he was possessed *de viginti petrat. carnis bovium*. Now there is no such word as *petrat*, which signifies a stone of beef, and there is a proper word for a stone-weight: and the rule is, when an improper word is put in the declaration, for which there is a proper word to signify the same thing, it is always held to be naught.

3. That he was possessed *de viginti vasibus*, (*anglice*, wooden vessels) the word *vas* is too general: so *de uno pullo* hath been held ill for the same reason.

4. It

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4. It is said, these goods *ad manus* of the defendant *per inventionem debuerunt*, instead of *devenerant*; for which reason this is not a good declaration. It was said on the other side, that in the first year of the king, the plaintiff declared in trover, that he was possessed *de una pecia branditti vini*, and that was held good after verdict, though there is a proper word for brandy. *Adjournatur.* 5 Mod. 324. *Salisbury v. Proffor.*

P * 364.

53. In an action of trover and conversion of certain loads of wood, upon a special verdict the case was; Sir Thomas Palmer was seized of a *great wood, and bargained and sold to one Cornford, and his assigns, as many trees as would make 600 cords of wood, to be taken by the assignment of Sir Thomas Palmer. Cornford assigns over his interest to the plaintiff. Afterwards Sir Thomas Palmer granted to the defendant so much of his wood as would make 4000 cords, to be taken at the defendant's election. The plaintiff afterwards, by the assignment of Sir Thomas Palmer, cut down the trees in question, to make 600 cords. And the defendant claiming them by virtue of his grant, took them, and it was found, that there was sufficient wood left for the defendant to take his 4000 cords. *Et si, &c.* And upon this verdict it was moved, that here was not a sufficient title found for the plaintiff. For first, it is not found, that the bargain and sale was for any sum of money, nor upon any consideration. *Sed non allocatur*; for it is intended to be so, being found by the verdict. But if it had not been so found, it might peradventure have been otherwise. As 1 Mar. 19 Dy. is. Secondly, it was alledged, that this grant to the plaintiff is void: for, until the assignment made by Sir Thomas Palmer, no interest vested in Cornford himself, so as he could not make any grant thereof over. But all the court held the grant to be good: for being made to him and his assigns, he may make an assignee which shall enure as a nomination to one who is to have by the appointment of Sir Thomas Palmer; and it may well vest in him, as the interest also. And here he hath an interest before the assignment made by Sir Thomas Palmer; inasmuch as if Sir Thomas Palmer will not assign it in convenient time, he himself might take them. And therefore he may assign this interest, as 44 Ed. 3. 43. is. But admitting the grant to the plaintiff had been void; yet Popham said, that the action was maintainable; because by the cutting down of them he had possession, and a good title against the defendant, and every stranger: and being cut down, it was not lawful for the defendant to take them: for if one sells 1000 cords of wood, to be taken at the vendee's election; and afterwards the grantor himself, or a stranger, cuts down parcel of the wood; the vendee cannot take that which is cut down: but he ought to make his grant good out of that which is growing. As if estovers were granted unto him, to be taken in a great wood, and the owner of the wood cuts down some wood, the grantee cannot take that which is cut down; but he must take

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take his estovers out of the residue. And if all be cut down, he hath not any remedy, but an action on the case." So here, altho' the plaintiff had not a good title, yet his having possession of them, being cut down, sufficeth. *Quod Gawdy and Clinch concesserunt.* Wherefore it was adjudged for the plaintiff. 1 Cro. 819. *Basset v. Maynard.* 5 Co. 24. b.

54. An action of trover and conversion was brought, on not guilty pleaded, there was found a special verdict to this effect;

Francis Bayle being a merchant, had made a fraudulent deed to the defendant of the goods contained in the count; but afterwards he went abroad to church, and to the *Exchange*; and did trade and commerce. And yet afterwards it is contained in the indenture of sale, by the commissioners to the plaintiff, that he had made this fraudulent deed; and that afterwards he had traded and attended at the *Exchange* until a day after; at which day he wholly absented himself. And upon this special verdict the defendant had judgment. For every deed to defraud other creditors (but those to whom this deed is made) is not sufficient to make one to be a bankrupt; it shall not bind: But upon the statute of 1 Jac. which makes him a bankrupt who makes fraudulent deeds; it ought not to be as this case was; viz. So long before he became a bankrupt. And there were many more imperfections in the special verdict. *Hut. 42. Cartwright v. Underhill.* See *T. Jones* 94. *Butler v. Waterhouse.*

*55. Trover for his anchor and sails: upon not guilty pleaded, P *365. a special verdict was found, viz. that the mayor and burgesses of *Newcastle*, by custom time out of mind, had used and ought to repair the port there; and had, in consideration therefore, a toll of 5s. per chaldron of all coals exported, to be paid by the exporter; and for that, by the same custom, he used to distrain any thing distrainable; and that the defendant being master of a vessel loaded with coals, intended to be carried out of the said port, refused; and for this they distrained the said anchor and sails, being part of the tackle belonging to the said ship: and if this was distrainable, they found for the defendant; otherwise for the plaintiff. And Mr. *Northey* urged, that the conclusion of the special verdict being upon a special point, the court could doubt of nothing but what was thereby referred to them. *Vid. 5 Co. 97. 1 Cro. 21. Mo. 261. pl. 420.* However the court heard and over ruled all the other objections, and held, 1st, that it was not necessary the town should shew that they actually did keep the port in repair; for their keeping the port in repair, is not the consideration, but their being bound by custom to do it. 2dly, That though the master is not strictly the exporter, yet as to port duties, the master is always looked upon as such, and the person answerable; for to put them to seek the merchants is impracticable, and it is but reasonable the master should pay a duty for the benefit of the port, and that the

town

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town should have the duty, who are to maintain the port. As to the distress, it was argued, that the instruments of trade are not distrainable; *viz.* a millstone is not; *Averia caruca* are not; a horse in a smith's shop cannot be distrained; that the goods subject to toll only can be taken; and this was part of the ship, and going from market. *Vide* 3 Cro. 227. pl. 14 Dyer 199. 1 Leon. 231, 105. 3 Dro. 550, 569. Noy. 88. 1 Inst. 47. 1 Syd. 341. Dyer 312.

On the other side it was said, *Averia Caruca* are not privileged where there is no other distress. *Vid. Stat.* 51 H. 3. 2 Inst. 122, 133, 565. So it is of instruments of trade; as if there be two mill-stones, or *averia otiosa*. Mo. 214. Dyer 302. Godb. 67. Owen 149. A boat is distrainable; *ergo* a ship, and *ergo* a fail of a ship. Dyer 177. pl. 73.

Sed per Holt, Ch. Just. The duty arises from the goods loaded on board the ship, with which the master is chargeable; therefore the ship, and every thing there of the master's, is chargeable as well as the goods; and the defendant had judgment. *Salk.* 1. Vol. 248. *Vinkestone v. Ebdon*.

56. In trover, the defendant pleaded a recovery against J. P. and that a *fieri facias* was awarded to the sheriff; and after the writ awarded and delivered to the sheriff, J. P. died possessed of the goods, and made the plaintiff his executor; and afterwards the defendant, by force of the sheriff's warrant, took these goods in execution, as bailiff to the sheriff, and delivered them to him. The plaintiff replieth, that the sheriff returned the writ *Tarde*; and upon this it was demurred in law. 1 Question, if the party dying after the writ of execution awarded, and before it was served; if it may be served upon his goods, in the hands of his executors or administrators? And it was held, it might; for by the execution awarded, the goods were bound, and the sheriff need not take notice of his death. 26 H. 7. 5. 6 E. 6. Dyer 76. 2 Question, if the false return of the sheriff shall make the bailiff punishable for that he did lawfully; for he was a bailiff's messenger, and a meer servant to the sheriff, and not a bailiff of a franchise. And it was held clearly, that it should not; for by the execution of the bailiff, the party was discharged of the execution; and therefore there is not any reason he should take advantage against the bailiff; and it was adjudged for the defendant. 1 Cro. 181. *Parkes v. Moss*. S. C. *Moore* 352.

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*Other Cases where this Action hath been held to lie, and where not. P *366.

Hetley 22. Owen v. Price.	451. Gibson v. Thompson.
Allen 81. Udal v. Udal.	718. Bull v. Knight.
91. Davies v. Doys.	751. Butter v. Wakerhouse.
3 Cro. 271. Chapman v. Allen.	785. Butts v. Penny.
274. Petty v. Sands.	834. Clerk v. Payter.
515. Latham v. Atwood.	Allen 93. Alwin v. Taylor.
544. Lytser v. Home.	Ray. 472. Put and Hardy v. Rawstern and others,
94. Owen v. Ap. Rees.	Danv. Abr. 20, 21.
148. Audley v. Halsey.	
89. Kynaston v. Moore.	
262. Wilton v. Chambers.	
2 Keb. 588. Wilbraham v. Snow	
3 Keb. 74. Duke of Buckingham v. Lord Pembroke.	

Secondly, *Who may bring the Action.*

1. One *part-owner* of a ship may bring an action of trover for the whole ship. *Comb. 367. Dockwray v. Dickerson.*

2. If an infant executor releases, yet he may afterwards bring an action of trover, if such release was not made upon a valuable consideration. *5 Co. 27. Russell v. Pratt. Moor 146. 1 And. 177. 1 Leon. 44.*

3. An administrator may bring an action of trover and conversion, before letters of administration granted. *Stile 341. Long v. Hobb.*

4. A man may bring an action of trover and conversion for goods, though they afterwards come to his hands again. *Stile 261. Gower v. ———*

5. Where trover has been brought by *Baron and Feme*, and they declare, that they were possessed, and that the defendant converted them *ad dampnum ipsorum*; it was held naught after a verdict; for the possession of the wife, is the possession of the husband. *1 Salk. 114. Nelthorpe & Ux. v. Anderson. 1 Ven. 33, 24, 12.*

6. In an action of trover and conversion, it was moved in arrest of judgment, that the action was brought by *Baron and Feme*, and the trover supposed to be before, and the conversion subsequent to the coverture, and therefore it ought to be brought by the *Baron* alone; for if a *Feme* loses goods, and after marries, the husband dies, his executor shall have the goods, because the property was in him by the marriage, notwithstanding the loss. And of this opinion was *Hyde* Chief justice, and *Kelynge*; and they also held, that the conversion is the cause of the action, and that being subsequent to the marriage, the husband ought therefore to bring the action alone.

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But judge *Twisden* and *Wyndham* were of opinion, the action was well brought; and they distinguished between actions which affirm the property, as *Replewins* and *Detinues*, which they therefore held, ought to be brought only in the husband's name; and actions which disaffirm the property, as *trespass* and *trover*, which being founded on a tort antecedent to the coverture, ought therefore to be brought in both in their names. 2 *Syd.* 172. *Powes & Ux. v. Marshall.* V. 1 *Cro.* 508. *Rivers v. Gidskert.*

7. Where the intestate died in the defendant's house, and *A.* breaks open chest, and takes a way money of the intestate's; it was by *Holt* Chief Justice held, that the proper action is an action of trover by the administrator, against the person that took it away; and if the trover were first, and the administration afterwards, the plaintiff may either declare specially, or lay the trover after the administration granted; and it will be good either way. *Comb.* 304.

P *367.

*8. Where *A.* dies intestate, and *B.* hearing of it, requested *C.* to provide for the funeral, and that *B.* would reimburse him; afterwards *B.* and *C.* come to an account, and *B.* delivers to *C.* a horse of the intestate's, in satisfaction of part of the charges of the funeral, which *C.* accepted of; and afterwards *C.* took out administration, and brought an action against *B.* for this very horse. Chief Justice *Holt* was of opinion, that *C.* might bring this action, notwithstanding the objection, that he was *particeps criminis*; for says he, clearly, if a stranger had taken out letters of administration, he might have brought an action against *B.* and there is no reason that this case should differ, because the plaintiff is *quasi* a third person, inasmuch as he now sues in right of the intestate; but the other judges were of a contrary opinion; and judgment was given for the defendant. *Carthew* 103. *Whitehall v. Squire.*

9. One jointenant, tenant in common or coparcener, cannot bring this action against his companion, but he may against a stranger. *Salk.* 290. *Browne v. Hedges.*

10. A goldsmith has lottery tickets of *A.* and *B.* and delivers *A.*'s tickets to *B.* as his own; *A.* may bring this action against *B.* *Salk.* 283. *Ford v. Hopkins.*

11. If after an execution by *fieri facias* is executed, and before the goods are sold, any person takes them away, and converts them to his own use, the sheriff may bring an action of trover and conversion for them. 2 *Saund.* 47. *Wilbraham v. Snow.* 2 *Syd.* 447. 1 *Mod.* 40.

12. Trover may be brought by an executor, though the possession he had of the goods was not an actual possession, but only a possession given him by law. 2 *Mod.* 168. *Latch* 214. *Hudson v. Hudson.*

13. Where the master may have an action against the servant for money converted by him. *Noy* 12. *Anonymus.*

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14. It hath formerly been a doubt, whether executors could maintain an action of trover, and it hath been insisted that an action of trespass *de bonis asportatis in vita testatoris*, was their proper remedy: And it appears by *Savil, Rep. p. 133.* that this opinion prevailed once; and in *Gouldsb. p. 89.* it was doubted: Soon after, as appears by the case of the Countess of Rutland, in *Cro. 377. Moore 266.* and *Owen 156.* and by the case of *Ruffel and Prat*, reported in *1 And. p. 177, Moore 176. 5 Co. 274. 4 Leon. 44.* and *Noy. 70.* it was solemnly adjudged, that executors might maintain an action of trover and conversion; nor does it appear that this point was ever questioned since, though many such actions have been brought.

15. *Fremling* and his wife, executrix of *A. B.* brought an action of trover and conversion against *Clutterbook*, for goods of the testator's found and converted by the defendant, and obtained a verdict against him. The defendant moved in arrest of judgment, and took these exceptions. First, that the declaration was of a joint possession of goods of the husband and wife, and damages are given to the husband and wife, whereas the goods properly belonged to the wife only, as the executrix, and not the husband and wife. Secondly, it doth not set forth how the same came to the possession of the goods. But to this *Rolle*, justice, answered, that the possession of the wife, as executrix, was also the possession of her husband, and that the damages recovered shall go to the estate of the testator, and so may concern them both; and for the second exception, this being a possessory action only, it is necessary to shew how the possession of the goods was gained. Judgment was staid till the other should move. *Stile 48. Fleming and Clutterbook.*

16. The plaintiffs brought an action of trover and conversion, as executrix, against the defendant, for an obligation, and declared it was lost in the testator's life time, but laid the conversion since his death. Two of the executors were served, and a *non prof.* entered as to them; and to the third the defendant pleaded *non cul.* and found against him, and five hundred pounds damages given; and it was now moved in arrest of judgment upon this severance; and held by *Hale*, Chief Baron, and the whole court, that summons and severance lies not in this case, because the conversion, which is the most material part of the declaration, was in the executors own time; so that upon the matter, the action is grounded on their own possession, as trespass of their own possession; in which case summons and severance does not lie, and consequently the nonsuit of one is the nonsuit of all; and all the proceedings after are to no purpose. *Per Hale*, Chief Baron, there are two sorts of severances; when the plaintiff will not appear, there he shall be summoned and severed; the other, when all appear, but some one or more will not prosecute; there he or they shall be severed by order of court; and judgment in this case was arrested. *Hard. 317. Manley & ap v. Lovell.*

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Other Cases by whom Action is to be brought.

1 Ven. 26. Batmore v. Graves.	206. Chambers v. Patinson.
3 Cro. 254. Rhemes v. Humphrys and others.	263. Blackborne v. Grev es.
3 Cro. 242. Berry v. Heard.	282. Sykes v. Walls.
3 Cro. 437. Tregmiel v. Reeve.	Ray. 463. Wedgewood v. Bayly.
274. Waller and Petty v. Sands.	2 Sound. 47. Wilbraham v. Snow.
3 Keb. 54. Smyth v. Smyth.	

Thirdly, *Against whom it may be brought.*

1. Trover lieth against a carrier for the owner of the goods ; and it may be brought by the carrier against him who so took them away. *Comb. 21. 1 Ven. 223. Comb. 333. Salk. 655.*

2. Trover was brought against an hackney coachman, and the goods were delivered to his servant ; and whether this delivery shall charge the master, was the question, and adjudged that it shall not ; for that it differs from a waggoner, where he is paid for the passenger, and the parcel also ; but in a coach the passengers are allowed to carry a small parcel ; and if any more be carried, for which the driver is paid, and it is lost, the master shall not be chargeable ; otherwise where the master is paid for it, and agrees to it. *Skinner 625. Middleton v. Fowler.*

3. It hath been held, where an action was brought against a husband and wife ; and it was laid, that the conversion was *ad usum ipsorum*, &c. and both were found guilty, and the damages assessed, that it is ill ; for they ought not to be joined. *Salk. 114. Nelthorp & Ux. v. Anderson. 38 E. 3. 1. 23 R. 2. 644. 3 Cro. 254. Rhemes v. Humphrys. Palmer 343. Berrey v. Newry. Stile 115.* This last case was where a stranger was joined with them in conversion.

4. And yet in 1 *Leon. 312. Marthe's* case, where goods came to a feme covert by trover, and she and her husband converted them to their own use, and the action was brought against the husband only. It was held it ought to have been brought against the husband and wife ; but *this does not seem to be law. Noy 79. W. Jones 143. Litt. Rep. 181. Yelv. 166. Draper v. Hulkes*, to the same purpose. *Buller's* case adjudged to the contrary. *W. Jones. 267.*

5. Whether an action of trover may be brought against a waterman, for goods miscarried, by reason of a tempest. 2 *Bullst. 289. Bird v. Astcock.*

6. Upon a trial at *nisi prius* at Guildhall, before my Lord Chief Justice North, in trover and conversion against an executor *de son tort* ;

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tort; the question came to be, whether the goods having been taken in execution, upon a judgment obtained against the defendant by a creditor of the deceased, should discharge him against the plaintiff, who brought *this action as administrator. And the opinion of the chief justice was, that this execution was a good discharge against another creditor that should sue him, to whom he might plead *riens inter ses mains*; but it was no discharge against an administrator, for men must not be encouraged to meddle with a personal estate without right: but to prevent this mischief, where the party dies intestate, and there is a contest about the administration, a man may procure of the ordinary letters *ad colligendum*.
1 Vent. 349.

7. In trover and conversion of goods. Upon a demurrer, the case was, the ordinary committed administration of the goods of an intestate to the defendant; afterwards the next of kin sues out a citation in the court christian against the defendant, to repeal the administration, and he, *pendente lite*, sells those goods, and afterwards his administration is repealed, and administration committed to the plaintiff, who for this conversion, *pendente lite*, brings this action; and it was moved for the defendant, that the action lies not; for the administration at the common law is well committed, and the statute doth not alter the law in this point, but gives the penalty against the ordinary, if he commits them not to the next of kin; and the administrator, until administration repealed, hath an absolute authority to dispose of the goods as he pleases. *Tanfield e contra*. The conversion, *pendente lite*, in the court-christian is not lawful, but is a tort to the plaintiff, and that, the sentence there proves; which is, that all things exempted, or done, *pendente lite*, shall be void; and the justices ought to have regard to the civil law in this point, as in 27 H. 6. Gard. 118. 2 R. 2. *Quare Impedit*, 143. and 4 H. 7. 13. And by the sentence it appears that the administration is revoked as if it had never been. And upon this reason it is in *Dyer* 339. where an administrator recovered a debt, and afterwards another procured himself to be joined in the administration, and released the debt, and afterwards it being revoked, this release was not any bar to the execution; and *Mich.* 35 & 36 *Eliz.* in the Common Bench, between *White* and *Cary*, this very point was in question, and adjudged, that the action lay. *Garwidy*. The action well lies; for the sentence does not repeal mean actions, acts done by an administrator which are for the intestate's benefit; but forasmuch as these goods were not converted or employed for the intestate's use, it is reasonable that he should be charged for them. *Popham* and *Fenner e contra*. For the administrator hath an absolute and lawful interest and power to dispose of the goods until repeal be made, and it is not like to an appeal upon a sentence, for that makes it as no sentence; but the repeal of the letters of administration doth not make it void *ab initio*, and make a lawful act tortious; but rather
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in this case, the new administrator shall have an account for the monies received, and the words in the sentence are not to be regarded, for they are ordinary in all sentences. So he having the goods lawfully, and converting them lawfully, shall not answer for them as for a tort done. And *Popham* here said, if administration being committed, the ordinary commits new administration, it is a repeal of the former, without any sentence of repeal; and if the first administrator waste the goods, the creditor shall have the action against him; and if he pleads, that administration is committed over, he may well by his replication maintain his action, because he wasted the goods when he was administrator; the matter was adjourned: but afterwards the action was discontinued by the plaintiff. 1 Cro. 469. *Wilson v. Packman*. 6 Co. 18. S. C. and *Moore* 369.

8. If after a verdict, and before the day in bank, or after judgment, the plaintiff's letters of administration are repealed, whereby the defendant becomes liable to the new administrator, he cannot in either case aid himself by plea, but shall be relieved on an *audita querela*. *Yelw.* 125. *Ket v. Life*. 2 Saund. 147. *Turner v. Davis*.

P *370. *9. An action of trover and conversion was brought for an haband set with pearls and diamonds. Upon Not guilty pleaded, a special verdict was found, that the plaintiff was possessed thereof, and pawned it to *John Whitlock* for 25 l. but no certain time appointed for the redemption thereof; that *Whitlock* being sick, his wife in presence, and with his assent, delivered it to the defendant, and afterwards *Whitlock* made his wife his executrix, and died, who proved the will; that the plaintiff tendered to the said executrix the said 25 l. who refused, and afterwards demanded the haband of the defendant, who refused to deliver it, but converted it to his own use; whereupon, &c. and in this case, three points were moved; first, there being no time appointed for the redemption, whether it may be made after the death of him to whom it was pawned, or ought to be in the lives of both the parties? and as the justices resolved, it may be well made after the death of him to whom it was pledged, but not after the death of him who pledged it. *Yelverton* and *Croke* doubted, and held that it could not; for he at his peril ought to redeem it in his time, as it is upon a mortgage. But *Fleming* and the others against it; for pledging doth not make an absolute property, but is a delivery only until he pays, &c. so it is a debt due to the one, and a remainder of the thing unto the other, for which there may be a redemand at any time upon payment of the money; for the pledge delivered is but as a security for the money lent, so as he who borrows the money is to have his pledge again when he repays it, and his tender gives him an interest therein; and there is a difference between a mortgage of land and pledging of goods, for the mortgagee hath an absolute interest

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terest in the land, but the other hath but a special property in the goods, to detain them for his security. 5 H. 7. 1. 9 Ed. 4. 25. 36 Ed. 3. Bar. 188. Secondly, it was resolved, that by this delivery of the said goods by the feme, with the assent of her baron, to the defendant, there passed no interest of them to the defendant, but (as it were) a custody only; and therefore the tender of the redemption ought to be made to the executrix, and not to the defendant. Thirdly, that when he rendered the money to the executrix, and she refused, it was as good as payment, and the special property of the goods is reverted in the plaintiff; then when he demanded them of the defendant, and he refused to deliver them, but converted them to his own use, a trover and conversion well lies, although he came unto them by a lawful delivery, and not by trover; wherefore it was adjudged for the plaintiff. 2 Cro. 244. *Racliff v. Davis*. S. C. *Yelw.* 158. S. C. 1 *Bulst.* 29.

10. An action on the case was brought against executors, and the plaintiff declared, that he was possessed of divers goods, that they casually came to their testator's hands, who converted them to his own use, and avers, that the executors had assets; they pleaded that they were not guilty, and it was found for the plaintiff; and moved in arrest of judgment, that *non culp.* by them was no issue, because the plaintiff in his declaration had alledged no offence or tort in the executors, but in the testator for the converting the goods to his own use; therefore for the executors to plead *non culp.* in whom tort was supposed, did make no issue; and for this cause judgment was staid. *Savil* 13.

Fourthly, Of the Declaration.

1 Where trover is brought for several things, and the declaration describes one or more of the things by a *Latin* word that is insensible, the plaintiff may take his damages, as to those things that are well described, and release them as to those things that are ill described. 3 *Salk.* 366. *Benbrigg v. Day*.

2. In trover, the plaintiff declared for ten pair of curtains and vallance; it is good without shewing the kind and *quantum* of the stuff, and *so it is of such artificial things; but trover for planks, P *371. unless the plaintiff sets forth how many, is not good; but for planks in his granary, or for books in his study, is good. 3 *Salk.* 366.

3. The plaintiff declared for two hundred ounces of plate by the *Latin* word *argenti anglice* plate); and it was held well enough. *Campbell v. St. John*, *Comb.* 306. *Salk.* 219.

4. In trover against husband and wife, the plaintiff cannot declare of a conversion by the husband and wife, to the use of the wife, nor to the use of the husband and wife: but he may declare of a conversion by the husband and wife, to the use of the husband, or that

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the wife converted the goods to the use of a stranger. 3 *Salk.* 365. *Anonymus.*

5. A declaration in trover for twenty ounces of cloves, and held ill; though it is not shewn how much of each, or that they were mixed. *Salk.* 654. *Hartford v. Jones.*

6. Where a declaration was for converting ten trees, calling them *decem arbores*, though the exception was, that *arbor dum crescit lignum dum crescere nescit*; yet Rolle chief justice said, they were well enough expressed. *Stile* 235. *Popham v. White.*

7. In trover, if the plaintiff alledges no place, although it be found for the plaintiff upon the general issue; yet the plaintiff cannot have judgment. 2 *Roll's Rep.* 66. *Anonymus.*

8. In describing the goods converted, when the proceedings were in *Latin*, it was the *Latin* word which the court were to take notice of; and if more was in the *Anglice* than the *Latin* word would bear, it is void; as that which is so mentioned above what the *Latin* word will itself describe. 2 *Roll's Rep.* 255. 2 *Cro.* 664.

9. Where the declaration was, *de tribus ponderibus lane ad valentiam octoginta solidorum*, judgment was staied for the incertainty; for *pondus* signifies every manner of weight. 2 *Roll's Rep.* 369. *Lawrence v. Turner.*

10. In trover for a dead thing, there ought to be added the value, and the price if it be alive. 2 *Cro.* 136. But if no value be mentioned in the declaration, it is good after a verdict. 653, 654. *Bradford v. Ramsey.*

11. An administrator, to whom administration is committed by a peculiar; if he doth not set forth in his declaration, that he was *loci illius ordinarius*, shall, notwithstanding he has omitted it, have judgment after a verdict. 1 *Cro.* *Lacy v. Smith.*

12. In trover and conversion, no other place is to be expressed in the declaration, but that only where the goods came to the defendant's hands. 1 *Bulst.* 206. *Atkins v. Wheeler.*

13. Coke said, it was adjudged in an action of trover and conversion, the conversion is traversable; for it is the substance of the action, and the tort supposed in him, and so may well be traversed: for if one finds goods, but doth not convert them, no action lieth. As the case was in a trover and conversion of goods. The defendant saith he took them damage-feasant, and impounded them, *absque hoc*, that he converted them to his use. And in *Leak's* case it was adjudged, that the place and time of conversion are to be alledged, for they are material; and for that they were not alledged, the bill was abated after a verdict. 1 *Cro.* 97. *Stranham's Case.* S. Point. 1 *Cro.* 78. *Hubbard's Case.* But the want of a place is aided, if the defendant plead a special plea; as sale in market-overt, after a verdict, and by the statute; because the venue is in the plea. *Goldf. Rep.* 54. and 89.

14. An

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14. An exception was taken to a declaration in trover, that the plaintiff did not say he was possessed of the things *ut de bonis suis propriis*. But the plaintiff had judgment. See *Moore* 691. *Maynard v. Battell*.

*15. It was moved in arrest of judgment, on the return of the P *372. writ of enquiry, that the time of the conversion was not alledged; and the declaration for that cause was held naught by two judges. *Brownl.* 8.

16. An action of trover of goods was brought, supposing the 3d. of May, 14 Jac. he was possessed of the goods, and the same day lost them; and that the 4th of May, Anno 14. *supradict.* they came to the defendant's hands by trover; and that *postea*, viz. *primo Maii anno supradict.* he converted them: and it was found for the plaintiff; and now moved in arrest of judgment, that the declaration is not good; for the conversion is alledged before trover, which cannot be; and therefore void: *sed non allocatur*; but it was adjudged, that *postea convertit*, is sufficient, and *scilicet* is void. And a precedent was then shewn in an *ejectione firmæ*, where the ejectionment was alledged, that *postea scilicet*, such a day, which was before the lease; and it was found for the plaintiff; for the *scilicet* being repugnant is void; and the *postea eject.* was held well enough. Whereupon it was adjudged for the plaintiff. 2 Cro. 428. *Tesmond v. Johnson. quære tamen*; for in *Yelv. p. 98. Wilbore v. Coggan*, in *assumpsit*, the judgment was for this exception staid.

17. Error was brought of a judgment in the King's Bench: for that the bill, in an action of trover, was of 400 bushels of pippins, the declaration was forty bushels; and judgment being given upon *nil dicit*, the writ of enquiry recites the trover and conversion of 400 bushels. And thereupon damages found to 40 l. and judgment accordingly. And errors assigned, because the writ of enquiry of damages varied from the declaration upon the record; there being more in the writ than in the record upon which the judgment was entered. The defendant hereupon alledged diminution, and procured the bill upon the file to be certified; and then pleaded *in nullo est erratum*. And all the justices and barons held, that it was error; for the bill doth not warrant the declaration; and the judges ought to be warranted by the declaration on the record, and if it be variant from it, it is error; and they said, that it could not be amended; for it is the record to which the party was to plead: wherefore a rule was given for the reversal of the judgment; but afterwards staid upon a surmise, that the record itself was miscertified. 2 Cro. 294. *Cleydon v. Taylor*.

18. In an action of trover and conversion; after a verdict for the plaintiff, it was moved in arrest of judgment, that the action was commenced in *Hillary-Term*, and the conversion alledged to be on the third day of *February* in the same term; and the bill filed relates to the first day of the term, so before the cause of action.

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But it was resolved by the court, that if the bail was entered after the third day of *February*, it is well enough; for it is that which gives this court jurisdiction.

So an ejectment may be brought upon a lease made in the same term: so the statute of limitation may be pleaded to an action, if the time be elapsed before the day wherein the bail is filed, though not before the first day of the term, wherein the action is brought; for the action shall not be said to be depending until the bail is filed. And upon search it was found, that the bail was filed the last day of the term. 1 *Ven.* 135. See 2 *Roll. Rep.* 475. *Lea v. Narsh.* 2 *Lev.* 13, & 176. 2 *Syd.* 373. *Lideot v. Backwell.*

19. To an action of trover of divers goods (naming them particularly) and converting of them, the defendant pleaded not guilty, and found against him, and damages assessed to 40 l. And it was now moved in arrest of judgment, first, that the action is brought of divers things by an administrator of goods of the intestate's found and converted; and it appears that parcel of those goods are things fixed to the freehold, and as parcel thereof, for which this action lies not; and divers parcels of them are insensibly alledged, and there be not any such words in *Latin* or otherwise for them; and the damages being entire, there ought not to be any judgment; for the declaration is, that he was possessed *de duobus articulis, vocat. Portal cum suspensis, vocat.* Hinges; and *de uno molendino, vocat.* an hand-mill; and *de uno plumbeo, vocat.* a lead; and *de una alveola, vocat.* a washing-fat, and lost them, &c. which things appear to be fixed to the house, and are as parcel thereof, and to be accounted as goods; so the action lies not for them; for the portal is a door to the house, and the hand-mill and the lead, (which is a brewing lead: and the washing-fat, (which is parcel of the brewing vessels) are always fixed things, and go to the heir, and not to the executors, as 20 *H.* 7. is: *Sed non allocatur*; for it is alledged in the declaration, that he was possessed of them *ut de bonis propriis*. And it may be these things were severed from the freehold, and things lying by; and it shall be so intended when the plaintiff so declares, and the contrary appears not to the court by any matter shewn unto them by the defendant's plea. Secondly, for that he declares, *de quatuor ollis æriis, vocat.* brass-pots, where it ought to be *ollis æheneis*; for there is not such a word as *æriis*. *Sed non allocatur*; for when it is added, *vocat.* brass-pots, that is as much as to say, *Anglice*, brass-pots, which the court knows was intended; which although it be not in congruous *Latin*, or in apt words for it; yet it is good enough, and of such nature were divers other things in the declaration; but they had all one answer. Thirdly, because he declares, that he was possessed *de uno spadone, una equa pretii* 53 s. 4 d. So there is not any price at all for the gelding; and for that cause *Popham* and *Yelverton* held the declaration to be ill; for to every thing there ought to be added the value, if it be a dead

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dead thing, and the price, if it be alive; and forasmuch as this wanted thereof, they held it to be vicious. But *Williams, Tanfield* and *Fenner, e contra*; for they said it was not of necessity, especially where the thing is not demanded, but damages for it. And therefore *Williams* cited the the register, fo. 37. That such exception at the common law was not material. But they held, that at the most it was but default of form, which is aided by the statute of 18 *Eliz.* But the other justices denied it, and said, it was substance, and not form only. But afterwards upon viewing the roll in court, although the record of *nisi prius* was so, yet the roll is *de uno spadone & una equa pretii* 53 s. 4 d so the price extends to both; wherefore they held it all to be good enough. Wherefore they awarded the record of *nisi prius* should be amended according to the roll; and it was adjudged for the plaintiff. *Note*; There was a precedent cited, *Trin. 24 Eliz. Rot. 723*. That for wanting *vi & armis*, in trespass, it was resolved to be but form and not substance, and aided by 18 *Eliz. Noy* 115. 2 *Cro.* 129. *Wood v. Smith.*

20. The value of the goods in trover need not be precisely alleged; *aliter* in detinue; the reason of the diversity is, because in detinue, the things themselves, or the value of them, is to be recovered; but in trover only damages. Adjudged on writ of error. 2 *Roll. Rep. Goodwin v. Harwood.*

21. A writ of error was brought to reverse a judgment, given by default in the Common Pleas, in an action of trover and conversion, and the error assigned was, that the plaintiff had declared for two pieces of cloth, and did not express whether they were linen or woollen cloth; but the exception was over-ruled, and the judgment affirmed. *Nisi, &c. Stile* 419. *Iles and Winsor.*

22. It was moved in arrest of judgment, that the plaintiff had declared of the trover and conversion of a certain number expressed in the declaration of pieces *panni lanei, anglice*, of red, yellow and black cloth; which is uncertain, and cannot be used as it is here, to express cloth of divers colours; for *panni lanei* signifies only woollen cloth. But *Barn*, justice, said, all is but woollen cloth, P *374. though they be of divers colours, and therefore it is good enough. *Hodsdon*, the secondary, said, sometimes the colours are used to be expressed, and sometimes not. *Bacon*, It is better to express the colours than not; yet it is good enough without the expressing of them. Therefore let the plaintiff take his judgment. *Stile* 75.

23. An action of trover and conversion, for that the plaintiff, 9 *Martii* 18 *Jac. apud Chelmsford*, was possessed of a writing obligatory, wherein *John Petchy* and *Thomas Petchy*, were obliged to the plaintiff in 60 l. sealed with the seals of the said *John Petchy* and *Thomas Petchy*, *ut de scripto suo obligatorio proprio, & sic possessionatus*, 12 *Martii*, 18 *Jac.* lost it. And that upon the 13 *Martii*, 18 *Jac.* at *Chelmsford*, it came to the defendant's hands by trover: and that the defendant 20 *Martii*, 18 *Jac.* at *Chelmsford* aforesaid, converted it

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it to his own use. Upon this declaration, the defendant demurred in law, because the date of the bond is not mentioned ; nor that it was delivered as their deed ; but without much argument it was adjudged for the plaintiff ; for he needs not shew the date, because it is lost, and the defendant hath esloined it. And he is not to recover the debt, but damages. Therefore secondly, the allegation that it was *scriptum obligatorium*, wherein they were obliged, hath intendment sufficient that they delivered it as their deed. Wherefore, &c. 2 Cro. 637. *Upchard v. Tatam*.

24. Error of a judgment in the Common Bench. Upon trover and conversion of a bond of 100 l. conditioned for the payment of 50 l. at such a day ; which came to the defendant's hands, and he being required such a day and year to deliver it, had not delivered it, but refused and converted it to his own use, (but no day, year, or place of this conversion mentioned) the defendant pleaded not guilty, and found against him, and judgment for the plaintiff. The first error assigned by *Grimston* was, because the date of the bond is not mentioned ; *sed non allocatur* ; for being lost and converted, he peradventure did not know the certain date of the bond, and if he should recite a date, and misrecite it, it would be a failer of his suit. The second error, because he did not alledge the day nor place of the conversion ; *sed non allocatur* ; for the denying to deliver upon request is a conversion ; and the day, year, and place are thereby alledged ; which is sufficient : and the allegation of the conversion (which hath no day, nor place) is not material, when there was a sufficient conversion before ; whereupon the judgment was affirmed. 2 Cro. 262. *Wilson v. Chambers*.

25. In trover and conversion for a mare.

Upon not guilty pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment, that the mare was laid *ad valentiam*, and it should have been *pretii*. *Sed non allocatur* after verdict (2 Cro. 207. *Stile* 174, 182, 2).

The plaintiff declares, that he was possessed *de quadam equa ut de catallis suis propriis*, and that *catalla pred. casualiter perdidit*, and that coming to the defendant's hands, he converted *catalla prædicta* to his own use ; so that there is no express conversion of the mare.

The court said, that the declaration was inartificial, but good after verdict ; for *catalla prædicta* must refer to the mare ; for nothing else is mentioned before. 2 Ven. 174.

So is *bona & catalla prædicta*, though there was only a waistcoat mentioned, good on general demurrer, though perhaps it would be ill on a special one. See *Lutw.* 1537. *Allen v. Harris*.

26. In an action of trover for divers things, & *inter alia de sex catulis quatuor catellis & una amphora saporis*, after verdict for the plaintiff, it was moved in arrest of judgment, that *catulis* signifies whelps, *catellis* little whelps of any kind, and that *saporis* signifies savour for which no action lay ; but the court gave judgment for the

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the plaintiff, and said, they would intend the whelps were dogs whelps, and that no damages were given but for the *Amphora*. P *375.
3 *Lev.* 336. *Chambers v. Warkhouse*. *Sed quare*; for this case does not seem to be law. *Vide* the following cases.

27. *Trover de duabus centenis plumbi uræ, anglice*, two hundred weight of lead ore.

It was objected, that *centena* signifies an hundred in a county, and it is uncertain therefore what is understood by it; but the court said it was good with the *Anglice*, and to be understood by the subject matter. *Trover de duobus ponderibus casei, Anglice*, two weights of cheese, hath been held good; so *de duobus oneribus cupri, Anglice*, two horse-loads of copper. 1 *Ven.* 211.

28. In trover and conversion for divers parcels of householdstuff, an exception was taken to the declaration, because the plaintiff, amongst other things, had declared *pro sex parcellis plumbi Anerii, anglice*, pewter porringers: Whereas the word *parcellis* is uncertain; for a parcel doth consist of many things in number, and so *sex parcellis* cannot properly be applied to six porringers; but if it had been *sex peciis*, it had been better, though that be also uncertain. *Hale* held it was all one as if it had been *pro sex peciis plumbi cinerii*. *Rolle*, Chief Justice, inclined it was well enough, because though the words are not so proper, yet the description is good enough. *Ferman*, Justice, was of the same opinion. But *Nicholas*, Justice, that the *Latin* is not good; for if there be proper words for a thing, they ought to be used, otherwise barbarism will be introduced; and circumlocutions ought not to be used where there is a proper *Latin* word to be had to express a thing. *Ask*, Justice, agreed with *Rolle* the Chief Justice, and the plaintiff was bid take his judgment, except better matter were shewn to the contrary. *Stile* 199. *Graves v. Drake*.

29. In an action of trover and conversion the plaintiff had a verdict; the defendant moved an arrest of judgment, and took these exceptions to the declaration: First, the plaintiff declares *pro tribus duodenis fili, Anglice*, dozens of thread; which is uncertain; for it may be three dozen pounds of thread, or skenes of thread, or ounces of thread. To this it was answered, that it cannot be otherwise expressed, and the word dozens of thread is used amongst merchants, and well known unto them what is meant by them. Secondly, he declares for so many pounds of muscat, instead of *nucum muscatarum, anglice* nutmegs. But this exception was mistaken, for the record was otherwise; and besides, it was with an *Anglice*, which makes it certain. The court ruled judgment to be entered, except cause shewed for the plaintiff. *Stile* 80. *William v. Tyrer*.

30. In an action of trover and conversion, and a verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff did declare for books and for stockings found and converted, and doth not shew what books, viz. whether *English* or *Latin*, or in what other language; nor, whether law-books, divinity, physick, or any other

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other subject ; and because he did not declare what sort of stockings they were, whether woollen, worsted or silk, &c. But the court over ruled the exceptions ; and said, that books were not things of divers species, be they of what language or subject soever : Neither the stockings ; for were they silk, or woollen, or worsted, they were but stockings ; and so ruled judgment to be entered, *Stile* 25. See 1 *Bulst.* 126.

P * 376. 31. An action of trover and conversion of divers goods, & *inter alia de uno Risco, Anglice*, a trunk full of fine linen, *ad valentiam* 20l. & *de una Pixide, Anglice*, a box full of bands, cuffs and shirts, *ad valentiam* 10l. and of divers parcels of other goods. The defendant pleaded not guilty, and verdict found against him, and entire damages assessed to 80l. and it was moved in arrest of judgment, that this declaration is not good ; for *Riscus* is but a trunk only, and *Anglice*, full of fine linen is uncertain ; and damages were given upon that uncertainty. And *it was said, that this case differs from *Osborn and Middleton's Case. Co. l. 10. f. 130.* For there *Fulcrum lecti* may be construed and understood of all that appertains to the furniture of a bed ; but *Riscus*, and an *Anglice*, full of linen, cannot be intended to be understood, and referred to linen ; and if it should be referred, it is uncertain ; and if it should not be referred to linen, it was never intended that 20l. should be for the value of the trunk ; and therefore it is not good, as *Playter's Case. Co. 5. f. 34. trespass, quare pisces suos cepit.* is not good for the uncertainty. And of that opinion was *Haughton* ; for if he had said, *de Risco, Anglice*, a trunk full of gold to the value of 500 l. and damages had been given accordingly ; none will say, that it was for the trunk only, but the gold therein ; which had not been good for the uncertainty. But *Lea, Doderidge and Chamberlain*, held it to be good, and that damages should be intended to be given for the trunk only : wherefore it was adjudged for the plaintiff. Note ; a writ of error was brought of this judgment ; and this judgment affirmed. 2 *Cro.* 664. *Bancroft v. Co.*

But 2 *Roll's Rep. p. 254. Bancroft's Case*, it is doubted, whether *un. Riscus, Anglice*, a trunk full of linen, *una Pixis, Anglice*, a box full of linen, were good.

32. In an action of trover and conversion *de decem paribus velorum & regularum, Anglice*, curtains and vallance : It was moved in arrest of judgment, that the declaration was uncertain, because it did not appear how many there were of the one, or how many of the other, nor what was meant by a pair ; but judgment was given for the plaintiff, contrary to the opinion of *Twisslen*, who relied upon the preceding case. 2 *Syd.* 445. *Taylor v. Wells. S. C.* 2 *Saund.* 74. And with this opinion agrees the judgment in the case of *Feeke and Ward. 1 Syd.* 174. but in 1 *Vent.* 71. *Anonymus*, which seems to be the report of the above-mentioned case of *Taylor and Wells*, it is said, it was adjudged to be ill. *Ideo quære.*

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33. In trover of goods. The defendant pleaded not guilty, and found against him; and it was now moved in arrest of judgment to be an ill declaration; for he counts that he was possessed of such goods, shewing what they were *in specie cum aliis implementis ad valentiam* 3l. but expresseth not what they were; and that he was possessed of other parcels (particularly declaring what) *cum aliis necessariis*; but mentions not what they were; and that he was possessed *de suis*, but doth not set forth their number. The defendant, by verdict, was found guilty of all contained in the declaration, and damages intirely assessed for all, which being so incertain, the court cannot give judgment for those parcels which are incertain. And of that opinion was the whole court for the incertainty in the declaration. But *Garwy* held, that in regard the defendant had admitted it, he cannot now after a verdict take advantage thereof. As 20 *Ass.* 3 is. But the other justices *e contra*. Because here is not any certainty at all, *pro implementis & necessariis*: But there is a reasonable certainty, although upon demurrer; because it is not altogether certain, judgment shall be against the incertainty; yet after verdict he shall take no advantage if there be any convenient certainty; but here is not any certainty. Wherefore it was adjudged for the defendant. 1 *Cro.* 817. *Wood v. Smith.*

34. The plaintiff declared in trover for several things, *& aliis utensiliis, Anglice*, implements, and obtained a verdict; but the damages being intire, judgment was staid, because of the incertainty of the expression, *aliis utensiliis quot quanta & qualia*. 3 *Lew.* 18. *Blackhouse v. Moore.*

35. Trover for two pair of pot-hooks, &c. After not guilty pleaded, and a verdict for the plaintiff, *Allen* moved in arrest of judgment, that hangers is a too incertain and equivocal word. *Baldwin*, for the plaintiff, insisted upon it, that since pot-hooks preceded the word hangers, the court could not intend these were any other hangers, than such on which pot-hooks used to hang. And he cited a *case of trover for a billiard-table, port, sticks and balls, and adjudged good, because the port, sticks and balls, should be intended things appurtenant to the table. But the court was of opinion, that it was too incertain a word; for the word does not immediately follow the word pot-hooks, but there are divers other things mentioned between; therefore judgment was staid. *Raym.* 2. *Seaman v. Barnes.*

P *377.

36. Exception to an action of the case brought, and the plaintiff declares, that whereas the plaintiff had delivered the defendant *unum statum salis, Anglice*, a bushel of salt, pretending that *statum* had another proper signification; but because it was shewed to the court, that *statum* by one dictionary, was *Latin* for a bushel, judgment was given for the plaintiff. 1 *Brownl.* 16.

37. In a writ of error upon a judgment in the common bench, in an action of trover, where judgment was given for the plaintiff, error

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error was assigned in the declaration, which was, because it was *de decem juvencis, Anglice*, bullocks and heifers, and did not say how many of the one, and of the other.

But it was answered, that the *Latin* word being proper, and of known signification, the *Anglice* was void, according to *Osbourne's Case*, 10 Co. But the court reversed the judgment, and cited the case before in this court, trover *de viginti ovibus matricibus et agnis*; and it was resolved to be naught, for not ascertaining the number of each. But *Twisden* said, there was a trover brought *de viginti averiis*, viz. *Bobus, agnis, &c.* and *viginti* was applied to each *species*, and held well. It was offered in this case to distinguish it from the case *de ovibus matricibus et agnis*, that there the *Latin* was of two sorts; *sed non allocatur*; for the words here being equivocal, it was all one. 1 Ven. 317. *Davis v. Price*.

Other Case where the Declaration have been held good and sufficient, and where not.

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| <p>1 Ven. 71. Anonymus.
 1 Ven. 135. Anonymus.
 2 Ven. 63. Bles v. Frost.
 174. Anonymus.
 3 Cro. 525. Whyte v. Hanby.
 2 Keb. 188. Bird v. Watson.
 2 Keb. 640. Taylor v. Wells.
 681. Kemon v. Wells.
 743. Thomson v. Custis.
 753. Elfiqve v. Action.
 3 Keb. 14. Dennis v. Turbel.
 3 Keb. 153. Niller v. Green.
 3 Keb. 209. Esto v. Brown.
 253. Hancock v. Hodges.
 693. Price v. Davis.
 — Dobson v. Bell.
 1 Cro. 865. Gramvil v. Rebo-
 tham.
 4 Mod. 156. Cook v. Bolinger.
 Stile 136. Heyford v. Hobson.
 3. Cro. 545. Lyfter v. Home.
 Dyer 306. Fines v. Spencer.
 7 Co. f. 17.
 Stile 264. Sawyer v. Russell.
 1 Brownlow 16.
 Stile 69.</p> | <p>194. } Heath v. Udall.
 358. }
 2 Lev. 85. Miller v. Green.
 11. Coleman and others
 v. Bard and Nemes.
 Stile 31. Segar v. Dyer.
 2 Syd. 60. Ellis v. Yarrow.
 1 Lev. 48.
 Stile 483. Clark v. Fitzwilliam.
 2 Lev. 177. Dunwell v. Ballock.
 1 Lev. 99. Mayhow v. Flower.
 2 Roll's Rep. 369. Lawrence v.
 Turner.
 3 Lev. 18. Blackkouse v. Moore.
 1 Cro. 818. Draycott v. Piott.
 1 Mod. 289. } Wood v. Davis.
 1 Lev. 301. }
 1 Ven. 17.
 Stile 232, 235. Popham v.
 White.
 360. Webb v. Wash-
 burne.
 2 Cro. 307. Clifton v. Procter.
 6 Co. f. 14. Arundell's Case.
 Stile 25. 1 Bul. 126.
 224. Ernely v. Allen.
 Fifthly,</p> |
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*Fifthly, Of the Plea.

P *378.

1. In an action of trover for jewels, it was said by *Twifden*, there is no plea in trover, but a release, or not guilty, every special plea in justification being but tantamount to it. 1 *Keb.* 305. *Devoe v. Dr. Coridon.*

2 So has it been said by the Chief Justice *Holt*, that there is no proper plea in this action but the general issue; and he likewise said in the case of *Hartford v. Jones*, that the plea there mentioned, is the only good special plea extant in the books. But in order the better to understand this matter, it is to be observed,

1. That no plea or justification is good, which amounts only to the general issue.
2. That where a man justifies, he must confess or avoid the conversion.
3. That where the conversion is traversed, it must be traversed aptly and materially, and not to any superfluous matter in the plaintiff's declaration.
4. That in some cases the conversion, and in some the plaintiff's property, and in others the time and place is to be traversed.
5. That a recovery in trespass is a good bar to an action of trover.
6. That a recovery against one defendant, is a good bar for another defendant to plead.
7. That this action of trover, is within the statute of limitations.

To illustrate which, and several other particulars, see the following cases.

3. In trover and conversion, the defendant may plead not guilty, and give in evidence, that he distrained them till he was paid; but cannot plead specially that he took the goods by distress, or that he detained them as the horses of his host, till he paid for the horses standing; but if he pleads a matter which confesses the conversion, and avoids it, as in the case of *Yelverton* 198. it is good, by *Holt* Chief Justice. 3 *Salk.* 365. 2 *Salk.* 654,

4. In trover for one hundred sheep, the defendant justified under a *fiery facias*, by virtue whereof he took them in execution; and it was adjudged upon a demurrer that this plea was ill, because it doth not answer to the conversion, and he should have pleaded not guilty, and given this matter in evidence. 3 *Salk.* 365.

5. In the case of *Put and Hardy* in *Raymond* 472. 3 *Mod.* 11. It was adjudged, that a judgment for a defendant in trespass was not pleadable in bar to an action of trover for the same goods; but

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but that is not law, as it is said by *Holt* chief justice, and may be seen hereafter. *Comb.* 376. *Feilding v. Senat.*

6. It is not a good plea in bar for the defendant to say, that the plaintiff and another were joint-merchants, and jointly possessed of the ship and goods; and that one was dead, and had made an executor, for at most it is but in abatement. 3 *Lev.* 290. *Kemp v. Andrews.* *Show.* 188.

7. A release pleaded by one of three defendants to an action of trover operates to discharge the rest. 4 *Mod.* 379. *Kiffin v. Willis.*

P * 379. 8. A special plea in trover was held ill, because it did not confess and avoid, nor traverse the plaintiff's title to the goods alledged in the declaration, but only gives the plaintiff a colourable possession, without right or property, and a diversity was there taken between this action and an action of trespass, *quare vi et armis*; for in trespass, colour of possession given by the defendant to the plaintiff is sufficient, because the declaration is general, upon a supposal without any certain title; and therefore it is sufficient to answer a supposal of a title with a colour *of possession only; but in an action of trover, and in all other actions, where the plaintiff makes a title to the thing demanded, or to a thing for which he demands damages, there it behoves the defendant to make a better title to himself, and to traverse the plaintiff's title, or otherwise to confess and avoid it; as in 4 *Jac.* 1. It was adjudged in an action of trover for goods, where the defendant made a title to them paramount, and that he bailed them to the plaintiff to keep, by which the plaintiff became possessed, and that the defendant (as he well might) took them as his own goods. It was therefore adjudged no plea, because he answers the plaintiff's title only with a colour of possession. *Yelv.* 173. *Priestly v. White.*

9. The defendant may justify the trover at the place in the declaration, and the conversion at another place. 1 *Roll's Rep.* 1. *Hill v. Hawkins.*

10. If the plea of the defendant be, that he took the corn in such a place, by virtue of a custom for taking it for cleaning the marketplace, it has been held that it amounts to more than not guilty. 1 *Roll's Rep.* 1, 2, 45.

11. If the action be for taking a horse, and the defendant pleads that he is an hostler, and it was put to him at livery, and there died, it is no more than not guilty. 1 *Roll's Rep.* 22. *Whitaker v. Collet.*

12. In an action upon the case, the plaintiff declared for corn, which came to the hands of the defendant, and that he converted it, and supposed the coming to his hands to be in *London*. The defendant pleaded that he was seized of certain lands, in *R. in Berks*, and that the plaintiff did thereof disseise him, and sowed the lands; and before severance he himself re-entered, and took away the corn.

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as it was lawful for him to do, *absque hoc*, that any corn came to his hands in *London*; and by the opinion of the whole court, the traverse was held to be good. 4 *Leon.* 202.

13. An action of trover for goods was brought, and for converting them to his own use in *Ipswich*; the defendant pleaded, that the goods came to his hands in *Dunwich*, in the same county, and that the plaintiff gave to him all the goods which came to his hands in *Dunwich*, *absque hoc*, that he is guilty of any trover or conversion in *Ipswich*; it was holden to be a good manner of pleading, by reason of the special justification. *Vide* 27 *H. 6.* But where a justification is general, the county is not traversable at this day. *Vide* 19 *H. 6.* 7. 4 *Leon.* 106.

14. If the defendant pleads a sale in market-overt, it is good, without giving colour to the plaintiff. 1 *Roll's Rep.* 273. *Bisse v. Tyler.*

15. A justification, if it is not local, but transitory, is not good, and amounts but to the general issue. 1 *Roll's Rep.* 395. *Phillips v. Weeks.*

16. To plead the custom of *London* for buying goods in a shop, as in a market-overt, is not good, but must be given in evidence on the general issue. 1 *Roll's Rep.* 397. *Row v. Thompson.* 2 *Cro.*

165. 1 *Cro.* 454. Other cases where a sale in market-overt hath been held no plea. *Godb.* 267. 1 *Roll's Rep.* 273. *Hesley* 49. 2 *Cro.* 165. *Owen* 27. 1 *Cro.* 485. *Moor* 624.

17. To an action of trover for divers loads of corn, the defendant pleaded and entitled himself unto them as tithes severed; and because the plea amounts but to not guilty, the plaintiff demurred, and shewed it for cause, that the plea was not therefore good; and without argument it was adjudged for the plaintiff. 3 *Cro.* 157. *Lymet v. Wood.*

18. In an action upon the case for trover and conversion of goods, the defendant justified the taking of them damage-feasant, *absque hoc* that he converted them *aliter vel alio modo*; and it was thereupon demurred in law; for that the traverse was not good, because he confessed not any conversion; the plea also amounts to not guilty. Wherefore without argument it was adjudged for the plaintiff. 1 *Cro.* 435. *Dee v. Bacon.*

*19. In trover and conversion, supposing that the defendant had sold the thing for which the action was brought, *non vendidit* was held no plea, but the defendant ought to have pleaded not guilty. *New Bent.* 41. *Lord Mounteagle v. the Countess of Worcester.* S. C. *Dyer* 121. S. C. 1 *And.* 20. P *380.

20. In trover the plaintiff supposed that he was possessed of divers loads of corn and hay, at *H.* in the county of *M.* and that they came to the hands of the defendant by trover, and that he converted them to his own use. The defendant pleaded, that before the trover, he was seized of certain lands in *Burton*, in the county of *Stafford*,

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ford, in fee, and the corn and hay was growing upon the land, and he cut them as his proper goods, and was possessed thereof till he lost them; and they came to the hands of the plaintiff by trover, and he lost them again, and they came to the hands of the defendant, and he converted, as it was lawful for him to do. And upon this the plaintiff demurred in law; for that the plea amounts only to the general issue; and this cause was shewn for demurrer. And the court held, that as this was shewn specially for cause of demurrer, it was an ill plea, and gave judgment for the plaintiff. 1 Cro. 146. *Ward v. Blunt*.

21. In trover for six oxen in *London*, and there converted, &c. the defendant pleaded that he seized them in the manor of *D. in Essex*, as goods waived there, and so justified, *absque hoc*, that he was guilty in *London*: and *per cur'* it was no plea; for it amounts but to the general issue, containing no matter local, to make the place material. 1 Cro. 174. *Bullock v. Smith*.

22. In trover and conversion of twenty sheep; the defendant pleaded, that the Queen was, and yet is seized of the manor of *Newport-Pagnel*, in the county of *Bucks*; and that *malefactores ignoti* stole those sheep from the plaintiff, and brought them within the said manor, and there waived them: whereupon the defendant, as bailiff to the Queen of her said manor, seized them as the Queen's goods to the Queen's use, which is the same trover and conversion, and prays in aid of the Queen. Whereupon the plaintiff demurred specially, &c. *Gawdy* and *Popham* held, that the plea was not good; for that the conversion was not answered: he also ought not to have aid, because it is but a chattel; he hath not alledged, that he hath answered for them to the Queen; but that he needed not to have alledged any pursuit of felon. For *Popham* said, it ought to be alledged that the felon fled; or that he was in fear to be apprehended, and for that cause waived them: for if a felon carries away goods, which he hath stole within a manor, and leaves them there, and at another time goes away, the goods are not waived; for waiving shall be where he hath the goods when he flies for fear to be apprehended for them. And the reason of the forfeiture is, because there was a default in the party robbed, that he did not pursue him to have taken the goods from him, and therefore the law gives them to the Queen. But it is not necessary, that he be pursued for the felony, when he leaves the goods, so that he flies for this cause. But afterwards, because the plea was not in bar, but concludes, *si Regina inconsulta*, &c. they all resolved, that the judgment could not be given as upon a matter of bar. And because aid was not grantable in this case, it was awarded, that he should answer without aid. And so it was adjudged. 1 Cro. 693. *Foxley v. Annesly*. 4 Co. 109. *S. C.* And *Moore Rep.* 572.

23. In trover and conversion of a cow *apud Salop*. The defendant pleaded, that the queen was seized in fee of such a manor, and demised

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deceased it, and all estrays therein, &c. to J. S. for life, and conveys it by mean conveyances to himself; and that this cow came thither as an estray; whereupon he seized her, and caused her to be proclaimed in two market-towns next adjoining. And the plaintiff claimed a property; and the defendant demanding of him to pay for her feeding, that he *refused, and thereupon he denied to deliver the cow, and traverses that he is guilty of the conversion, *apud Salop*. And it was thereupon demurred, and held ill; because he shewed not the letters patent; and because he alledged not, that the proclamations were made in the parish-church; and because he traversed the will; and it was adjudged for the plaintiff. 1 Cro. 716. *Brownlow v. Lambert*.

P *381.

24. To an action *fur trover*, the defendant pleaded, that before the time, wherein the plaintiff supposes the goods to come to the defendant's hands, one S. A. was possessed of them; and amongst other goods sold them to the defendant, but retained them in his own hands, and afterwards sold them to the plaintiff, by reason whereof the plaintiff was possessed, and afterwards lost them, and they came to the defendant's hands, who converted them *prouit*, &c. Whereupon the plaintiff demurred; and it was held by the court to be an ill plea; for it amounts to not guilty: and it was doubted whether the court should compel the defendant to plead not guilty, or award a writ of enquiry; but at last it was resolved, that a writ of enquiry should be awarded. 1 Bro. 5. 2 Cro. 319. *Austin v. Austin*.

25. To an action upon the case on trover of 300 sheep, the first of *December*, 36 *Eliz*. The defendant pleaded, that he was sheriff of the county of *Lincoln*, and that J. S. recovered against the plaintiff 100 l. and thereupon had a *feri facias* to levy that debt; which writ was returnable *crastino animarum*, 35 *Eliz*. That this was delivered to him, being then sheriff of the said county, upon the first of *October*, 35 *Eliz*. to be executed; that he, by force thereof, upon the 20th of *October*, 35 *Eliz*. took the said 300 sheep, and sold them upon the 22d day of *October*, anno 35 *Eliz*. 100 and 4 sheep for 20 l. parcel of the said 100 l. and that the other 192 sheep remained in his said hands *pro defectu emptorum*. And on the said day of *crastin. anim*. he returned the said writ accordingly, and all this matter. The which is the same conversion, *absque hoc*, that he converted *aliter vel alio modo*; and thereupon the plaintiff demurred: and after argument the whole court held the plea to be insufficient. First, and principally, because he doth not by his plea confess any conversion, and then the traverse is ill: but he ought upon this matter to have pleaded not guilty, and have given this matter in evidence. Secondly, because he supposes the trover and conversion to be on the first of *December*, 36 *Eliz*. and he justifies the conversion in *October*, 35 *Eliz*. So he meets not with the plaintiff in time, and therefore he ought to have traversed it; and the traverse

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traverse *aliter vel alio modo*, shall never answer to the time, but to the manner of the conversion. Thirdly, he makes not any justification for four of the sheep, but that he seized them; but did not shew what he did with them: wherefore the plea doth not answer all that which is comprised in the declaration; and for that cause it was held ill in all. And of that opinion was all the court, and appointed judgment to be entered for the plaintiff; but after caused it to be staid for the equity of the matter. 1 Bro. 4. *Ascue v. Sanderfon*.

26. In trover and conversion of a ship, and nine pieces of the plaintiffs declared, that the first of March, 21 Jac. he was possessed, and the same day lost them which came to the defendant's hands, who 3 Octob. 3 Car. converted them to his own proper use. The defendant pleaded the statute of 21 Jac. of limitation of actions; and that the 20th of March, 21 Jac. *causa actionis accrevit*; so as not only three years, and more, are incurred since the parliament, but also six years after the conversion, before any action commenced. *Et hoc, &c.* The plaintiffs replied, that they were possessed of the same ship, as their proper goods; and so being possessed before the 20th of March, 19 Jac. viz. 1 Martii, 19 Jac. they agreed at London aforesaid, in parochia & warda *predicta*, that the said defendant, as their servant, should transport

P *382. *the said ship and goods to T. in Spain, being parts beyond seas, and should afterwards restore them unto the plaintiff upon request; whereupon the defendant taking the said ship, the said 1 Martii, 9 Jac. transported her to the parts beyond seas, viz. to T. and 20 Martii, 19 Jac. there sold the said ship and goods to persons unknown, and converted them to his proper use; and that the defendant, after the said conversion, remained in *partibus transmarinis usque primum Maii*, 1 Car. by reason of which stay, they could not sue him *per legem terræ*; and that 1 Maii, 1 Car. *apud London*, they required him to re-deliver the said ship and goods, which he refused to do. But that he then and there converted and disposed of the said goods. The first question was, whether this action was within the statute of limitations; and it was held, that though actions of trover are not mentioned specifically in the statute, yet it is implied in the general words of actions upon the case. The next question was, admitting the defendant was beyond seas for six years after the conversion, and did not return into England; whether the plaintiff had not liberty to bring the action at any time within six years after his return? for the *proviso* is on the part of the plaintiff, if he be over the sea at the time of the cause of action, that he shall have time after his return; and by the same equity, it shall be so where the defendant is over the seas, and cannot be sued. But that point the court did not resolve. Thirdly, if this request, and not delivery after his return, be not a new conversion, and cause of action; so that although he was barred before by the statute of limitation,

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imitation, whether he shall not hereby be restored to that action. And *Jones* and *Whitlock* conceived, that he should; and that he may be well intended, the goods came to his hands again after his sale; and the demanding them of him, and his denial and conversion, is good cause of action. But *Croke* doubted thereof. Fourthly, it was argued, that here the replication was a departure from the declaration; for by the declaration he supposeth a casual loss, and a trover by the defendant, and that to be 21 *Jac.* But in the replication he supposeth to restore; and then a sale of them the 20th of *March*, 19 *Jac.* so it varies in the time and manner how the defendant had them; also by his own confession, the conversion was made above six years before the action brought. But although *Croke* doubted therein, yet *Jones* and *Whitlock* over-ruled him, and gave judgment for the plaintiff, *absente Richardson*, Chief Justice. 3 *Cro.* 245, & 335. *Swayn & al' v. Stephens.* S. C. *W. Jones* 252.

27. In trover the defendant pleaded a release, &c. And it was held *per Holt*, chief justice, that in trespass, where the defendant pleaded a release before the time, he must also go on with an *absque hoc*, that he is guilty *ad aliquod tempus postea*: but if he does not vary the time, there needs no traverse; for suppose you alledge the trespass such a day, and the defendant justifies as to that day, the plaintiff may shew another day, and it is no departure, for the defendant has occasioned this; and there is a great difference between a bond and a trespass: if the declaration lays the bond to be dated on one day, the replication cannot say it was dated on another; but in trespass the plaintiff may depart as occasion requires; *sed adjournatur.* 1 *Salk.* 222. *Webley v. Ralmer.*

28. In an action upon the case upon a trover and conversion to his own use, *per venditionem quibusdam hominibus ignotis*; the defendant pleaded, that the goods were bailed to him, to bail to *J. S.* to whom he had delivered them, *absque hoc*, that he did convert them to his own proper use, *per venditionem hominibus ignotis.* The traverse was held ill; for the conversion to his own use, is the cause and the ground of the action, and not the selling the goods, &c. 2 *Leon.* 13.

*29. In trover for an horse, and selling him, and converting the money to his own use. The defendant confessed, that it was the plaintiff's horse, and that one *J. Courtнал* found and delivered him to the defendant to re-deliver it upon request: whereupon he re-delivered him to the said *J. C.* before the action brought, *absque hoc*, that he sold and converted the money to his own proper use. The court held, that as the substance in this case was the conversion, it might well be traversed; but as the defendant had taken a traverse to the converting the money to his own use, which was not materially alledged in the declaration, but is superfluous, and as the defendant by his traverse hath made it part of the issue; the

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traverse therefore is ill in that point ; and the demurrer being upon the traverse, it was adjudged for the plaintiff. 1 Cro. 554. *Kynnersley v. Barnard*.

30. In an action upon the case, the plaintiff declared in trover for a bag of money, and the conversion of it : the defendant pleaded, that the bag of money was delivered to him as a pawn to keep until *A.* and *B.* were agreed which of them should have it ; and pleaded further, that *A.* and *B.* were not yet agreed who of them should have it ; for which cause he kept it, *absque hoc*, that he converted it to his own use ; upon a demurrer in this case it was held, that the conversion was traversable. See the same case, 4 Ed. 6. *Br. Action upon the Case*, 113. So here *Fenner* agreed with *Wray*. 1 Leon. 247.

31. *Galliard* brought an action upon the case against *Archer* ; wherein the plaintiff declared, that he himself was possessed of certain goods, which by trover came to the hands of the defendant, who had converted them to his own use. The defendant pleaded, that before the trover supposed, one *A.* was possessed of the same goods as of his proper goods, and sold them to the defendant ; and that he had not any notice that the said goods were the goods of the plaintiff ; upon which the plaintiff demurred in law. And by *Anderston* the plea is not good ; for the plaintiff may chuse to have his action against the first finder, or against any other, that hath the goods after the sale, gift, or trover : and it hath been held by some, the defendant having the goods by sale, might traverse the finding. See *Contr.* 27 H. 6. 13. a. And that in detinue, where the plaintiff declares of a bailment, the defendant may say, that he found them, and traverse the bailment. 39 H. 6. 37. by *Moyle* : and by *Wyndham*, justice, the defendant may traverse the property of the goods in the plaintiff. 12 E. 4. 11. 1 Leon. 180. *Galliard* and *Archer's Case*.

32. In an action of trover for a gelding, the case was : one *Porter* stole this gelding from the plaintiff, and sold it to the defendant in open market, by the name of *Leister*, and it was entered so in the toll-book, that *Leister* sold him. The question was, if this alteration of the name shall not make any alteration of the property, although the sale was in open market ? *Wyndham* and *Rhodes*, justices, held this to be no good sale to bar the plaintiff, and grounded their opinion on the statute of the 2 & 3 Phil. M. c. 7. which provides, that no property of stolen goods shall be altered that are sold, unless the name and surname of the parties to the sale be written in the toll-book ; and *Shuttleworth* moved, that it should be in the market, and walked up and down there for an hour together, which is not set forth by the defendant in his bar. But the justices said, that such special plea need not to be, but it shall be intended. *Owen* 27. *Gibbs's Case*.

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33. In an action upon the case, on trover and conversion of sixteen broad cloths; the defendant pleads, that before the time of the trover and conversion, one *Morrice* was possessed of those goods, and sold them to the defendant; and before he had notice that they appertained to the plaintiff, he sold them to *J. S.* the which matter, &c. and it was thereupon demurred, 1 *Cro.* 480. *Gybson v. Garbyrn.* But it does not appear what was done thereon, but according to the case, in 2 *Bulst.* 134, 299. *of *Holman and Karriesley*, P *384. the defendant ought to have traversed the plaintiff's property.

34. An action of trover at *Paxton*, in the county of *Hunt.* the defendant pleads a bargain and sale at *Roylston*, in the county of *Hert.* in the market there, whereby he after converted them at *P.* in the county of *H.* The plaintiff saith, that he was possessed of those goods at *P.* in the county of *H.* and that *J. S.* there stole them from him; and by covin betwixt him and the defendant, at *P.* in the county of *H.* he sold them to the defendant, as he had pleaded. The issue was upon the sale made covin, &c. and it was tried in the county of *H.* and found for the plaintiff; and it was moved to be a mis-trial, for it ought to have been by a jury of the county of *Hert.* or at least-wise by a jury of both counties. And of that opinion was *Garwoly.* But the other justice *e contra*; for the sale is confessed, and the issue is upon the covin, which is well tried by a jury of the county of *Hertsf.* where it was alledged. And it was afterwards adjudged accordingly. 1 *Cro.* 510. *Harbing v. Sherman, Goldf.* 158. *S. C.*

35. In trover, the defendant pleaded, that he took them as bailiff of the king, for a distress upon a plaint *in curia manerii*, and sold them; and it was thereupon demurred, and adjudged ill; for upon a *distingas*, the cattle shall not be sold, especially in a court-baron, although it were in the King's court. 2 *Cro.* 255. *Gomerisul v. Wyats. S. C. Yelv.* 194.

36. In trover and conversion for two tuns of wine, the defendant pleaded, that the King, *j. re coronæ*, was seized in fee of the prisage of all wines imported *ex partibus transmarinis* by any person, whether a subject or alien; and that the prisage was *a tempore cujus*, &c. answered to the King, his progenitors, their farmers or deputies, in the manner following, *viz.* out of every vessel, importing into any port, or other place within this kingdom, 20 tuns of wine for any person *a partibus transmarinis*, and of that or *de aliquo vase inde vini prædicti* unloading a tun, and out of every vessel so importing 20 tuns of wine for any person into any port or other place within this realm; and *inde seu de aliquo inde vase prædicti disonerat* two tuns of wine, *viz.* one before the mast of such a ship, and the other behind the mast *ejusdem navis*; and that the King being so seized before the time that two tuns came to the defendant's hands, as the plaintiff supposes, *viz.* 21 *Sept. Anno* 5. by his letters patent, *hic incur' prolata*, granted to Sir *T. Waller*, the office of chief butler, to him

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him the King, his heirs and successors, with all the fees, &c. who was constituted thereby chief butler, *habendum, &c.* for life, to be exercised by him or his deputy, *& ulterius dicit*, that the chief butler for the time being used and accustomed by himself or deputy, to collect and receive to the King's use the said prisage, due as aforesaid: and also, that the said 13th day of April, Anno 7. *quædam navis*, loaden with 20 tuns of wine, came to the city of Exeter aforesaid, *a partibus, &c. scil't a villa de Bourdeaux in Gallia*; and that at the city aforesaid, nine tuns and a half of the said 20 tuns, being the plaintiff's wine, *adtunc exonerat' fuerunt ex navi præd per quod* two tuns of wine were due to the King for prisage; and being *legitime constitutus* deputy to Sir T. Waller, *tunc & adtunc* chief butler *& per ejus præceptum* the aforesaid two tuns *vini præd. pro prisagio dicto 13 die April. anno 7. præd.* at the city of Exeter, to the use of the King did take, and them to the King's use convert and dispose, *prout ei bene licuit quæ est eadem conversio, &c.* that the plaintiff supposes to be to the defendant's use, *& hoc paratus est verificare*; to this plea though four exceptions were made; yet the plea was held good. *Yelv. 198. Kenicot v. Bogan.* And this was the case that the late lord chief justice Holt held, that it was the only good special plea extant in our books. *Salk. 164.*

P *385. 37. In trover and conversion of goods at D. in the county of Nottingham, the defendant pleaded, that he recovered against the plaintiff a debt of 20 l. by bill in the King's Bench, and thereupon had a *feri facias* directed to the sheriff of York, who *apud Wakefield, in com. Eborum*, seized those goods, and delivered them unto him in satisfaction of this execution; and so justifies the conversion. And it was thereupon demurred, and without argument ruled, that the pleading was ill. First, Because he shewed not where the Queen's Bench was at the time of the recovery. It being a court removeable; as 5 *Ed. 4. 8.* is. Secondly, the trover and conversion is supposed to be in the county of *Nott.* and he justifies in the county of *York*, without traversing, &c. Thirdly, the sheriff upon a writ of *feri facias* cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt. Wherefore it was adjudged for the plaintiff. 1 *Cro. 504. Thomson v. Clerk. Noy 56. S. C.*

38. In trover of goods, the defendant justifies, as servant to the sheriff of *Middlesex*, because the plaintiff had stolen those goods, and carried them to D. within the county of *Middlesex*; at which place the defendant seized them *ut bona wavviata*; and without argument it was adjudged for the plaintiff; for he ought to alledge a felony committed; and that the goods were waived, by the felon: but it is not alledged that the felon waived them. Wherefore it was adjudged *ut supra.* 1 *Cro. 611. Davies's Case,*

39. To an action of trover and conversion of goods in London. The defendant justified, for that one *Robert Bash* was seized in fee of 20 acres in *Stanstead*, in the county of *Hertford*, and granted a

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rent-charge to *Robert Bash*, his executors and assigns of 16l. *per annum*, during the life of *Frances*, the wife of *Robert Bash*; which *Robert Bash* died intestate, and *Frances* his wife was administratrix unto him; and the defendant, as her servant, took a distress in the said 20 acres, for the said rent, by the command of the said *Frances*, and impounded them there, and traverses the taking and conversion of them in any other place. And it was thereupon demurred, and all the court held the plea to be ill; for the inducement to the traverse (which ought always to be good) is not a sufficient cause of justification for the taking of the distress; for this rent was determined by the death of *Robert Bash*, because there cannot be an occupant of rent. And the feme is not assignee by her taking of administration; for none can make title to a rent to have it against the tenant, unless he be party to the deed or conveys a sufficient title under it. Wherefore it was adjudged for the plaintiff. And whereas an exception was taken to the plea, because he traversed the county, the court did not speak thereto; for that they resolved the substance of the plea to be insufficient. 1 Cro. 901. *Salter v. Butler*. Noy 46. S. C. Yelv. 9. S. C. Moor 664.

40. In trover and conversion, the plaintiff declared, that whereas he was possessed of a bag of hops, and a bag of flax, to the value of £c. and that the defendants found them, and the third day of *October* converted them; and the defendants pleaded, that *Sandwich* is an ancient village, and that the custom of foreign attachments is used there as in *London*, and that these goods were lost upon default in *November*, and traversed; *absque hoc* that they were guilty of any conversion in *October*, or at any other time or day than the times before, which are contained in the declaration, that the defendants were not guilty before, (*Scil.*) *October*; upon which the plaintiff demurred, and judgment was given for the plaintiff, although it was objected, that the justification here by the custom aforesaid, had taken away the property; and as the plaintiff would be barred in detinue, so he is in trover: but the court was of the contrary opinion, that the defendant's plea in bar here shall not be good without a traverse; and as it is, the time is not made material, but any time before is sufficient. *Het.* 166. *Green v. Bronker and Greenstead*.

*41. In an action upon the case for a trover, the defendant after P *386. an imparlance pleaded an outlawry of the plaintiff; and it was holden by some to be a good bar, and therefore it may be pleaded after imparlance; as 16 E. 4. 4. in debt upon specialty; but not in debt upon a contract, trespass, battery, imprisonment, &c. for such matters the King shall not have by outlawry. Q. if this be law. 3 Leon. 235. *Markham and Pitt's Case*.

42. In an action upon the case, the plaintiff declared, that he was possessed of certain chattels, which came to the defendant by trover; the defendant pleaded, that heretofore the plaintiff brought debt

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debt against the now defendant, and demanded certain monies, and declared, that the defendant bought of him the same goods (whereof the action is now brought) for the sum then in demand, to which the then defendant waged his law, and had his law, by which *nihil capiat per breve*, &c. was entered; and demanded judgment, if, &c. And by *Wyndham* and *Rhodes*, justices, the same is no good bar in this action; for the waging of the law, and the doing of it, utterly disproves the contract supposed by the declaration in the said action of debt, and then the plaintiff is not bound by the supposal of it, but is at large to bring his action; and so judgment was given for the plaintiff. 2 *Leon.* 37. *L. Sands* and *Cagnard's Case*.

43. *Trover* and conversion in *communi banco*; the defendant pleaded judgment in *banco regis* upon special verdict in trespass for the same goods; and that the goods in the one and the other were the same, and conversion and taking the same, &c. The plaintiff demurred; and upon argument the whole court were of opinion, that it was a good bar, upon the authority of *Ferrer's Case*; and that notwithstanding the case of *Putt* and *Roylson*, in *banco regis*, adjudged by *Pemberton contra*; which case my Lord Chief Justice *Pollexfen* said he was never satisfied with, and as he remembered a writ of error was brought, and the judgment questioned; but afterwards agreed, that he saw no difference between a general and a special verdict. However they all thought a judgment in the one a bar to the other; for that the actions were of the same nature: and judgment was given for the defendant. *Show.* 146. *Lechmore v. Toplady, & al'*.

44. Action of *trover* of certain plate; the defendant pleads, that at another time the plaintiff had brought his action for this same plate against *J. S.* supposing the conversion to have been done by him. And in that action had judgment to recover 20 l. damages, and had *J. S.* in execution for the damages; and avers, that it is for the same goods, and for the same *trover* and conversion; and it was thereupon demurred. And after argument by *Clerk* for the plaintiff, that it was not any plea; because they having judgment, and the party's being in execution, is not any satisfaction unless the money be paid; and then without satisfaction it is not any plea in bar of this action: as in debt against two, by several *præcipe's*, upon one obligation, judgment and execution against one is no plea for the other without satisfaction. And execution of the body is not any satisfaction; as 33 *H.* 6. 47. 4 *H.* 7. 29 *H.* 8. Title *Executors* 132. 14 *H.* 4. But all the court held the plea to be good; for the cause of action being against divers, for which damages uncertain are recoverable; and he having judgment against the one for damages certain, that which was uncertain before, is reduced in *rem judicatam*, and to certainty, which takes away the action against the others. And therefore *Popham* said, if one hath judgment

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ment to recover in trespass against one, and damages certain, although he be not satisfied, yet he shall not have a new action of trespass. By the same reason *e contra*, if one hath a cause of action against two, and obtain judgment against the one, he shall not have remedy against the other; and the alledging, *that he hath the one in execution for this cause, is not an answer to the purpose; and the difference betwixt this cause, and the cause of debt upon an obligation against two, is, because there every of them is chargeable and liable to the intire debt; and therefore the recovery against the one, is no bar against the other until satisfaction. And *Fenner* said, that in case of a trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again: Wherefore by all the court, it was adjudged for the defendant. 2 Cro. 73. *Brown v. Wooton Moor* 762. P *387.

45. Action on trover of divers trees, *apud D.* in the county of *Surrey*; the defendant pleads, that *Queen Mary* was seised in fee of the manor of *D.* in the county of *Suffex*, where those trees were growing, and granted it to the defendant in tail, whereby he was seised thereof; and that *J. S.* cut the said trees and granted them to the plaintiff, who lost them, and the defendant found and converted them, &c. The plaintiff replies, *de injuria sua propria*, &c. And thereupon issue was joined. *Coke* moved, that the replication was ill; for *de injuria sua propria* is not any plea, where the defendant makes justification by claiming an interest in the freehold to himself; as 16 Ed. 4. 4. 44 Ed. 3. 18. and 14 H. 4. 32. is upon the same reason. But where one claims not any interest, but justifies by command or authority derived from another, it is otherwise: And of that opinion was the whole court. Wherefore a replader was awarded. 1 Cro. 539. *Archbishop of Canterbury v. Kemp*.

46. In trover the defendant pleaded, the now plaintiff had brought an action for the same things against *T. S.* and obtained judgment and execution, and avers they were the same things; and on demurrer judgment was given for the defendant. And a diversity was taken by the whole court where the demand and recovery is of a thing certain, or of one that is uncertain; for if two are jointly and severally bound in a bond of 100l. there recovery and execution against the one, is no bar to an action against the other; for it is no satisfaction of the 100l. 4 H. 7. 22. But where two commit a trespass which lies intirely in damages, there a recovery and execution against the one is a good bar against the other: Nay, it was agreed, that the very judgment was a sufficient bar, *quia transit in rem judicatam*; and the incertainty is reduced by the judgment to a certainty, and so altered and changed from what it was; therefore the plaintiff cannot resort back to the original incertainty of the thing demanded; so is judgment in battery against one a good bar to an action brought against another for the same. *Yelv.* 62.

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See other Cases concerning the Plea in this Action, in the following Books.

Hetley 49. Hedges v. Franklyn.	Stile 331. Rogers v. Done.
62. Panton v. Hassell.	3 Cro. 25. Laicon v. Barnard, S.
166. Green v. Bronker	C. Hutton 81.
and others.	11 Rich. 2. Tit. Trespafs 17.
3 Cro. 157. Lynnet v. Wood.	40 Ed. 3. fol. 27.
35. Lacon v. Barnard.	46 Ed. 3. fol. 18.
245. Swayn v. Stephens.	14 H. 7. fol. 12.
2 Keb. 57. Skinnington v. Reynolds.	44 Ed. 3. fol. 2.
437. Denye v. Perry.	3 Mod. 194. Beck v. Thyrrwit.
3 Keb. 127. Dakers v. Dunkin.	Stile 178. Coles v. Sybsye.
333. Ireton v. Newton.	2 Leon. 177. Sands v. Brocas.
709. Aftrey v. Ballard.	1 Cro. 485. Comyns v. Bowyer.
1 Cro. 539. Archbishop v. Kemp.	2 Cro. 165. Johns v. Williams.
P * 388. 1 Cro. 667. Ferrers & al' v. Arden	* 1 Cro. 454. Palmer v. Welley.
2. Mod. 63. Stubbins v. Bord	5 Co. 83. b. Goldsb. 158.
and others.	2 Cro. 68. Taylor v. Chambers.
	1 Keb. 305. Trin. 14 Car. 2.
	Danvers's Abr. 25.

Sixthly, Of the Trial, and Evidence.

1. Where many are concerned in the taking goods, and then an action is brought against one or more, it is said, that one of them concerned in the taking, may be admitted as an evidence against the rest. *Comb. 367. Dockwray v. Dickenson.*

2. In trover, the defendant cannot give a release in evidence, but he ought to plead it. *Com. 473. Kingston v. Read. Quare de hoc.*

3. In trover by an administrator on the intestate's possession, the defendant cannot give in evidence a will on the general issue; otherwise if it is on the administrator's own possession. 1 *Salk. 285. Far. 141.*

4. In trover and conversion, where there could be no trial by reason of a fault in the *Habeas Corpora*. 1 *Ven. 297. Anonymus.*

5. In trover at *nisi prius*, before Holt Chief Justice, upon evidence the case was this. A carpenter sent his servant to work for hire to the Queen's Yard, and having been there some time, when he would go no more, the surveyor of the yard would not let him have his tools, pretending a usage to detain tools, to enforce workmen to continue till the Queen's work was done; and a demand and refusal being proved at one time, and a tender and refusal at another, Holt, Chief Justice said, that the very denial of the goods to him that

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hath a right to demand them, is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion, but an assuming upon ones self the property and right of disposing of another's goods; and he that takes upon himself the right of disposing of them, is guilty of a conversion; so the taking and carrying away another man's goods is a conversion. So if one comes into my close, and takes my horse, and rides him, that is a conversion; and here, if the plaintiff had received the goods, upon their being tendered, notwithstanding the action would have lain upon the former conversion, and the plaintiff's having his goods afterwards, would go only in mitigation of damages, and he had no regard to the pretended usage, but compared it to the doctrine among the army; that if a man comes into the service, and brought his own horse, that the property thereof was immediately altered and vested in the Queen, which he had already condemned. And in this case one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the rest. *Mod. Ca. 212. Baldwin v. Cole.*

6. In an action of trover and conversion which was brought for oats, &c. the case upon evidence appeared to be, that certain trespassers had taken these oats from the plaintiff, and brought them to the mill to make them into oatmeal; and the plaintiff came to the miller before any thing done, and demanded the oats as his, and forbid him to proceed to make it into oatmeal, but the miller did proceed for all that, and made it into oatmeal. And the judge held it to be a conversion in the miller, and directed the jury accordingly; although it was argued by the council for the defendant, that a miller was a public officer, and did but his duty in this case. And in this case it was held further, that if *A.* takes goods from me, and these afterwards come to the hands of *B.* by his buying them, or otherwise, and he converts them to his use, *B.* shall not be charged to me without a new demand made of them unto him, and a detention afterwards. *Clayt. 57. Holdsworth's Case, Mod. 460. Cro. 495. Golds. 152.*

*7. Upon a motion for a new trial, the case appeared to be this; P *389.
an executor several years before, had left some household stuff in the house, by the consent of the heir, who used them, afterwards; and within six years of the action brought, the executor demands the goods, and the heir refused to let him have them; whereupon this action of trover was brought, and the statute of limitations was pleaded; and it was adjudged, that the using the goods before the demand, was no conversion or evidence of it; for it was with the consent of the executor till then; and the demand being within six years, the refusal which ensued it is the only evidence of a conversion in this case, and that being within the six years, though the trover was before the statute, cannot be pleaded. *Farell. 99. Worley Montague v. Sandwich.*

8. In

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8. In an action of trover and conversion, upon not guilty the evidence was, that the goods were taken and sold, by virtue of a commission of sewers; and it was ruled, that this matter might be well given in evidence, upon not guilty pleaded; as detaining of beasts in a market for toll. *Alleyne* 62. *Combs v. Cheyney*.

9. A denial to deliver goods, which the defendant hath in his possession is evidence unless it be in trover, for a thing in the open fields, which the plaintiff might have taken; but the finding of its being denied by a verdict, is not of itself sufficient for the court to construe it a conversion; but it is said that it is good evidence to a jury of a conversion. 1 *Roll's Rep.* 59. *Isaack v. Clarke*.

In this case of *Isaack v. Clarke*, it will be very proper to state the case, and take notice of the several points resolved therein. The jury found by a special verdict, that one *Adams* had a judgment against one *Lewis*, and against one *Watkins*, and another that were his pledges, in the court of the city of *Exeter*; and the defendant *Clarke* being the serjeant at mace in the city, after a *non est inventus* returned against *Lewis*, came to the house of *Watkins*, to levy an execution of the debt upon certain butts of wine, and by virtue of a *feri facias* seised them; and the plaintiff being there said to *Clarke*, I deliver to you this bag of money, in which was 22l. as in the declaration, with an intent, that you shall keep it till the next court, only for a delivery of the wine aforesaid to the said *Clarke* that day upon request, if *Watkins* do not obtain a forbearance of the debt of the plaintiff *Adams*. But *Watkins* did not obtain such forbearance, nor was the wine redelivered, or any thing done at the next court; and afterwards the plaintiff demanded the bag of money, and *Clarke* refused to pay it. Upon this case two questions arose. 1. Whether *Isaack* hath a right to have the bag of money, or no. 2. Admitting that he has, yet whether he has not mistaken his action. *Haughton*, as to the first point was of opinion, that the plaintiff hath no right to the bag, inasmuch as it is found that the serjeant seised the sack, &c. and it appears he did not take them out of the possession of the owner, but had this bag of money as a pledge, that the goods shall be redelivered upon request at such a day; yet notwithstanding, though the defendant does not make a demand, at the day, yet the plaintiff shall not have the bag of money, till the serjeant hath the butts delivered to him; for the request at the day is not material, but he might request it at any time afterwards; as if a man pawns goods to be redelivered such a day upon request, if he does not request the goods, on that day he may do it at any time afterwards; as to that first point, *Doderidge* was of another opinion, and that as there was no request on that day the privity of the bailment was determined. *Croke* was of the same opinion with *Haughton*, as to that point. But *Coke* said, he should be of the opinion of his brother *Haughton*, if there was no more in the case than was mentioned by him; but here, says he, the plaintiff hath a good right

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right to the sack ; for as the *feri facias* was returnable at the next court, so *that the serjeant might have sold the sack at any time, before the day of the return, but when the day is past, his power of selling is determined. And here it appears to be past, and it could be to no purpose for the serjeant to have the sack delivered to him, when he can do nothing with it ; and if his power had not been determined, it is true a request at that day would not have been material. As to the second point, the question was properly divided into three parts. 1. Whether trover and conversion would lie upon a bailment. 2. Whether the denial of the money without any thing more, was a conversion. 3. If all be adjudged against the defendant, yet whether upon this verdict the plaintiff could have judgment against the defendant. In the argument of this case divers points were spoken to, whether the bailment is traversable, of the nature of an action of detinue, and its difference from an action of trover, where the privity of the bailment is determined ; where a man shall have advantage upon a special plea, which he could not have upon not guilty, where an action of trespass or trover will not lie against the person to whom goods are bailed, and where it does, where the denial shall or shall not be deemed a conversion ; and the difference between money in a bag and out of a bag ; but upon the whole, judgment was given against the plaintiff.

10. Where the selling the goods was adjudged not to be a matter issuable. 1. *Anderson* 20. the Lord Mountague against the Countess of Worcester.

11. An action of trover was brought for five cows ; upon not guilty pleaded, a special verdict was found, that one *Blegrave* was possessed of those kine, and put them to pasturage with the defendant, and agreed to pay him twelve pence for every cow weekly, as long as they remained with him at pasture ; and that afterwards *Blegrave* sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time they had been with him, which amounted to ten pounds. Afterwards one *Forster* paying him the said ten pounds, by the appointment of *Blegrave*, he delivered the five beasts unto him ; and if *super totam materiam* he be guilty, they find for the plaintiff and damages twenty-five pounds ; and if, &c. then for the defendant. *Jones and Croke* (*absentibus ceteris Justiciariorum*) conceived, that this denial upon demand and delivery of them to *Forster*, was a conversion ; and that he may not detain the cattle against him who brought them, until the ten pounds be paid, but is put to his action against him, who placed them at pasturage. And it is not like to the cases of an inn-keeper or a taylor ; they may retain the horse or garment delivered to them until they be satisfied ; but not when one receives horses or kine, or other cattle to pasturage, paying for them a weekly sum, unless

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unless there be such an agreement betwixt them. Whereupon a rule was given, that judgment should be entered for the plaintiff, 3 Cro. 271. *Chapman v. Allen*.

12. In an action of trover and conversion, nothing was proved but a tortious taking of the cattle by way of trespass, and driving them away; and it was ruled a good ground for this present action, and a conversion shall be intended; otherwise when he comes to them by trover, there an actual conversion shall be proved. *Cl. 112. Beckwith v. Elsey, 2 Syd. 264. Bruen v. Roe*, agrees as to the first point, but says, that where the defendant comes by the goods by trover, that an actual demand must be proved.

13. In an action of trover, &c. to prove the conversion, it was offered, that the plaintiff did demand satisfaction for the corn; and it was ruled good evidence, the demand being to the party himself who took the corn; though the corn itself was not demanded, but satisfaction, *quod nota. Clayt. 122. Rookeby's Case*.

P *391. *14. *A.* brought an action upon the case, and declared, that the dean and chapter of *Westminster*, did lease unto him a house for years by deed indented, of which indenture he was possessed, and afterwards lost it; and by trover it came to the hands of the defendant, who sold it, and converted the money thereof coming to his own use; the defendant pleaded not guilty, and the plaintiff gave in evidence, that the said lease was made to him, and to one *B.* and that the said indenture was delivered to the said *B.* and that was agreed to be the possession of them both; and afterwards *B.* died, and afterwards *A.* the plaintiff was the sole owner of it; and that was holden to be good evidence on the part of the plaintiff; and if the plaintiff can prove the other part of his declaration, *i. e.* that the indenture came into the hands of the defendant, and that he sold it, that then he should recover. But it was given in evidence on the defendant's part, that the said *B.* sold to the said defendant his part and interest in the said lease, and also the said indenture; so as now he is become tenant in common with the plaintiff, and then his sale doth not give any cause of action to the plaintiff, and that was holden by the whole court to be good evidence without pleading it; the case went further, that *A.* being within age, his father leased the lands for twenty years; and afterwards the son at his full age, upon the back of the indenture, did release to the defendant all his right; and it was holden by *Wray* Justice, that when the father leased, he did it as guardian to his son; and it was not any ejectment, but it was a lease in the behalf of the son, although the son might avoid it; and then when the endorsement is *ut supra*, the same is a good assignment, and after the plaintiff was nonsuit. 2 Leon. 220.

15. In an action of trover and conversion of goods to the defendant's use; upon not guilty pleaded, they were at issue; and there an inventory of the goods was given in evidence to the jury, as the goods

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goods were appraised by upholsters. And in this evidence another point did arise, these goods were taken in execution, and delivered to the defendant by the sheriff; and afterwards the owner of the goods, against whom the execution was awarded, made a deed of gift of them to the plaintiff by these words, *He granted all those goods which were late put in execution.* Coke Chief Justice held, That this was not sufficient evidence. 4 Leon. 243. Arden and Goad's Case.

16. In an action of trover and conversion, if the jury find the conversion upon a bailment, yet that does not destroy the action, if it is for a conversion of money in a bag, a denial is a conversion, because it cannot be known from other money; but a denial of the delivery of a bond is not a conversion of itself; but where money is delivered as a pledge, till another thing be delivered, an action of trover will not lie against a person who receives the money, till the thing for which the money was pledged be redelivered. Moor. 841.

17. Where the plaintiff had a bill of exchange drawn upon the defendant, and the same was sent by J. to be accepted, who kept it, and would not deliver it, though the plaintiff had indorsed the bill, yet J. S. might be a witness. 1 Salk. 136. Lucas v. Haynes.

18. See a special verdict in trover for tithes. Yelv. 43. Chambers v. Mason, and several exceptions to the matters found thereby.

Concerning Evidence in Trover.

1. In an action of trover for a ship and cargo; it was objected in point of evidence, that the cargo was shipped by A. B. and company; and B. being dead, the action brought by A. only is ill, because it appears others have an interest; but it was ruled, that this ought to be proved, and if there are others, it is matter in abatement, and ought to have been so pleaded; and a distinction was made between an action *founded upon a tort, as this was, and a P *392. contract where the plea is *non assumpsit*; because upon *non assumpsit* it may be deemed another contract, but the party may make a tort joint or several; and if a man brings trover for a ship, and upon the evidence it appears he has but a sixteenth part, it is good, and the interest of the others shall only be given in mitigation of damages. Dockwray and Dickenson. P. 8 of W. 3. B. R. Skynner 640.

2. In an action of trover brought by an executor or administrator, on the possession of the testator or intestate, it is not necessary for the plaintiff to prove himself executor or administrator; but if it be brought on his own possession, he must prove it, to make himself a property in the goods as executor, &c. Far. 141.

3. An

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3. An action upon the case was brought for not delivering a horse, and for converting it to his own use, held good after a verdict; but upon a demurrer, *Hob.* was of opinion it would have been naught. 3 *Cro.* 16. 2 *Cro.* 150. 1 *Vent.* 366. 1 *Syd.* 295.

4. An action of trover was brought for goods, and the proof depended upon a *feri facias* and a *venditioni exponas*; and because they could not be found upon record, proof of them by witnesses was admitted as evidence; so a conviction of record was proved by witnesses, the record being burnt, it being not a matter directly in issue, but only inducement to the issue. *Har.* 323.

5. In trover and conversion, issue was joined that the horse in question was bought at *Dale* in the county of *York*, in open market there; but the evidence was, that it was bought at *S.* in *Lancashire*; and it was holden, that this did not prove the issue; and that as this is pleaded, the place is material; whereas upon a general issue it had not been so. *Clay* 131. *Anonymus.*

6. In trover, upon evidence at a trial before *Holt*, Chief Justice, at the sittings in *Middlesex*, the case was, the plaintiff proved the goods to be in his possession, and to be taken away by the defendant: the defendant shewed, that these were the goods of *Jane Blackham*, in her life-time; and that the defendant had taken out letters of administration to her, and so was intitled to the goods. Upon this the plaintiff proved, that some few days before her death, she was actually married to him: And in answer to that it was insisted, that the spiritual court had determined the right to be in the defendant; for they could not have granted administration to the defendant, but upon supposing there was no such marriage; and that this sentence being of a matter within their jurisdiction, was conclusive, and could not be gainsaid in evidence. And it was said by *Holt* Chief Justice, that a matter which has been directly determined by their sentence, cannot be again tried. Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but that is to be intended only in the point directly tried. But otherwise is it, if a collateral matter be collected or inferred from their sentence, as in this case; because the administration is granted to the defendant, therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point they tried had been married, and their sentence had been, not married. 1 *Salk.* 290. *Blackam's case.*

7. In an action of trover for money, the case upon evidence appeared to be, that the plaintiff's son had a general authority from his father, to receive and pay his father's money. The son took a bill for money due to his father, and received it without a particular authority for that purpose; and this receipt was with an intent to imbezil and spend it: But he gave a receipt as for money had to his father's use; and this money was given to the defendant. The questions were, first, if the son could be a witness in this case to prove the delivery? And secondly, *whether the father could maintain

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an action of trover? *Holt*, Chief Justice, was of opinion, that the son might be admitted as a good witness, his testimony being corroborated by other circumstances; and that the action was maintainable for the father; for that the general authority that the son had to take his father's money, made the receipt of the money to be to his father's use, and is a good discharge of the debt, so as that the father could not avoid the payment, and charge the person that paid the money with an action; and then, if the payment was a good discharge, it is reasonable it should be his money; and the possession of the son is the possession of the father, the son being to this purpose as his father's servant; and according to this opinion the plaintiff had a verdict, but he said he was willing to have a case made of it; but the defendant acquiesced in his opinion. 1 *Salk.* 209.

8. In an action on the case for a trover and conversion brought by J. S. a citizen of *Colchester*, against the farmers of toll of the city of *London* for taking of goods; the defendant pleaded not guilty. Upon a trial at bar, *Jones* and *Croke* being only in court, the defendant confessed the taking of the goods for non-payment of toll, which the citizens of *London* claimed by custom, and the citizens of *Colchester* claimed to be exempt by charter of King *Richard*, and the citizens of *London* proved by several records and entries in their books, that the citizens of *Colchester* paid toll. And on the evidence, the counsel for the plaintiff objected, that this was no good evidence on nor guilty, but ought to have been pleaded specially; to which opinion *Croke* inclined. *Sed Jones e contra*; for it is not like a general action of trespass, in that he must plead specially the custom for toll; but in an action on the case for trover and conversion, every thing that proves the conversion lawful may be given in evidence on the general issue; but the jury was permitted to bring in a special verdict if they pleased: nevertheless they found a general verdict for the defendant; and judgment was given accordingly. *W. Jones* 340. *City of Colchester v. City of London.* Note; It appears by 1 *Roll's Rep.* 44, in the case of *Hill* and *Hurwicks*, that the custom to take the toll may be pleaded specially.

9. In trover, upon not guilty pleaded it appeared in evidence, that the defendant was tenant by the curtesy of lands in *Ireland*, and had cut down and sold the trees of the estate; and that the reversion belonged to the plaintiff, and two others in coparcenary: upon a case made for the opinion of the court, it was resolved, First, That in local actions, as in trespass *quare clausum fregit*, the plaintiff cannot prove a trespass but where it lay, nor lay it in any other place but where it is; but it is otherwise in actions transitory, as trover: *ergo*, here he may lay the conversion, and prove it in *Ireland*. *Vide Stile* 331. Secondly, One jointenant, or tenant in common, or parcener, cannot bring trover against another; if he does, it is good evidence to destroy the action upon not guilty: but if

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if one jointenant brings trover against a stranger; in that case the defendant may plead it in abatement, but cannot take advantage of it in evidence. 2 *Lev.* 113. *Cro. El.* 554. 1 *Salk.* 290. *Brown v. Hedges.*

10. The detainer of goods from an owner after request, is allowed for a sufficient evidence to maintain a conversion; and *Hobart* said, that though legally it were not a conversion, yet in that case it was reasonable to allow it for an evidence to prove a conversion; because, if one man have goods of another lawfully, by finding or bailment, yet when the owner requires them, he that had them can no longer lawfully hold them; and therefore when a man still detains them from another, it argues he claims them as his own, and so uses them. *Hob.* 187. *Agar v. Lisle.* S. C. not S. P. 1 *Brow.* 5. S. C. *Hutt.* 10. But that book says, a request and refusal to deliver is good evidence to prove a conversion; but if it be found specially, it cannot be adjudged a conversion.

P* 394. *11. If the goods were not the plaintiff's, the defendant shall not plead it; but shall plead not guilty, and give it in evidence. *Bro. Action on the Case.* Pl. 109.

12. In an action upon the case upon a trover and conversion of 200 l. delivered by the plaintiff to the defendant; and upon not guilty pleaded, the question was, if denial by the defendant to pay it upon request, would bear an action; and the case of *Isaac* was argued, who brought an action of trover, &c. for 200 l. in a bag; and by a verdict it was found that a demand was made thereof, and a denial to pay; and by *Doderidge*, it was a conversion.

13. Trover for fourteen lemon-trees, and the statute of limitations pleaded. On evidence at *nisi prius*, *coram Holt*, chief justice, it appeared, the plaintiff obtained leave from my Lord *Brudenell* above six years before to have the trees stand in his garden at *Twittenham*; and that his Lordship's gardener might take care of them. After my Lord sold his garden, with all his trees therein, to my Lord *Portland*; who afterwards sold the garden, and whatever he had from my Lord *Brudenell*, to the defendant; and a demand and refusal within six years proved upon the defendant.

Here it was objected, 1. That the gardener, who received the trees first from the plaintiff, and continued gardener all along, and looked after and reared the trees, could not be a witness; for that he, in case he proved a title in the plaintiff, could hereby intitle himself to an action for his labour and skill employed in rearing up the trees; whereas if it went for the defendant, he was to have nothing.

But this was over-ruled by *Holt* chief justice, because if the gardener took care of them as my Lord *Brudenell's* servant, he was to have nothing for his pains from the defendant.

2. If my Lord only gave the gardener leave to do it for the plaintiff, the gardener then was so far the plaintiff's servant; and

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it was never doubted, but a servant was a good witness for his master.

He also held, that these trees being in boxes, and separate from the freehold, could not pass by the grant of the garden, nor by the words (all his trees therein); for they were not his trees; that is, my Lord *Brudenell's*. Nay, it would be hard to comprehend them by construction within the grant, if the words had been (all the trees in the garden), unless there were a schedule of the trees intended to pass, and the plaintiff's trees mentioned therein; but he agreed, if they had been conveyed by my Lord *Brudenell's* grant, that had been a conversion; and being above six years, the issue would be against the plaintiff.

And besides that, the grant of the garden was a determination of the license given to the plaintiff; and that the grantee might distrain the trees damage-feasant, but he having not done so, but suffered them to continue, was so far from a conversion, that it was evidence of a license to him. And he said, that by a grant of all a man's trees, apple-trees would not pass. And the plaintiff had a verdict. *Mod. C. 170. Oliviere v. Vernon.*

14. In an action upon the case on trover, it was found by a special verdict, that one *Peper* was possessed of those goods, and the defendant found them; and *Peper* made the plaintiff his executor; and that the defendant knowing them to appertain to the plaintiff, denied to deliver them unto him upon his request. And whether that were a conversion without any other act done? was the question; and all the justices, *Popham* absent, held, that it was a conversion by the sole denial. But being afterwards moved again, *Popham* held it to be no conversion: but it was cited at the bar, that 23 *Eliz.* in this court, it was ruled to the contrary. *Et adjournatur.* 1 *Cro.* 495. *Eason v. Newman S. C. Goldf.* 152. *S. C. Moore* 466. and there it is said to be adjudged a conversion in *Popham's* absence and cited to be so adjudged. *Moor* 841. *Isaac v. Clark. Brown* 17. *Anonymus.* adjudged a conversion. P *395.

15. In an action of trover and conversion; at the trial, Mr. Attorney General excepted against the evidence, that if it were true, it destroyed the plaintiff's action; inasmuch as it amounted to prove the defendant guilty of felony; but that they will not suffer a man to smother a felony and bring trespass for that which is a kind of a robbery. Indeed, said he, if they had been acquitted, or found guilty of felony, the action would lie; and therefore it may be maintained against Mrs. *Cory*, who was so; as likewise was *William Maynard* acquitted upon an indictment of felony for this matter, but not against the rest. But my Lord chief baron declared, and it was agreed, that it should not lie in the mouth of the party. To say that he himself was a thief, and therefore not guilty of the trespass; but perhaps if it had appeared upon the declaration the defendant ought to have been discharged of the trespass. *Quere* what the law

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law would be if it appeared upon the pleading, or were found by a special verdict. My lord chief baron did also declare, and it was agreed, that whereas *William Maynard*, one of the witnesses for the plaintiff, was guilty, as appeared by his own evidence, with the defendants, but was left out of the declaration, that he might be a witness for the plaintiff; and that he was a good and legal witness, but his credit was lessened by it; for that he swore in his own discharge; for that when these defendants should be convicted, and have satisfied the condemnation, he might plead the same in bar of an action brought against himself; but those in the *simul cum* were no witnesses. Several witnesses were received and allowed to prove, that *William Maynard* did at several times discourse and declare the same things, and to the like purpose that he testified now. And my lord chief baron said, though a hear-say was not to be allowed as a direct evidence, yet it might be made use of to this purpose; viz. to prove that *William Maynard* was constant to himself, whereby his testimony was corroborated. One *Thorn*, formerly Mr. *Reynel's* servant, being subpoenaed by the plaintiff to give evidence at his trial, did not appear. But it being sworn by the *Exeter* waggoner, that *Thorn* came so far on his journey hitherward as *Blanford*, and there fell so sick that he could not travel any farther; his depositions in chancery, in a suit there between these parties about this matter, were admitted to be read. 1 *Mod.* 282. *Lucy Luttrell v. G. Reynel, Esq. G. Turberville, Esq. J. Cory and Anne Cory.*

See the following Cases concerning this particular Head of the Trial and Evidence.

2 Keb. 750. <i>Thomas v. Day.</i>	2 Keb. 39. <i>Littcott v. Backwell.</i>
3 Keb. 57. <i>Harvey v. Loe.</i>	487. <i>Cotton v. Daintry.</i>
59. <i>Owen v. Lewis.</i>	3 Keb. 528. <i>Knoyle v. Heymet.</i>
397. <i>Verdale v. Martin.</i>	Allen 92. <i>Combs v. Cheny.</i>
Allen 18. <i>Wright v. Pindar.</i>	<i>Bruen v. Roe.</i> 1 <i>Syd.</i> 264.

Seventhly and Lastly, Of the Judgment and Execution.

1. In trover, the plaintiff declared of a finding by ten persons, and nine of them converted them; and upon not guilty pleaded the plaintiff had a verdict; but the judgment in the Common Pleas was reversed upon a writ of error, because the conversion is the gist of the action; and if a man finds goods, it is lawful for him to take them up. 3 *Salk.* 366.

2. Where one defendant pleads not guilty, and the other a release; if it be found for the defendant upon the release the plaintiff shall

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shall not have judgment against the other. *Comb.* 303, 310.
Kiffin's Case.

*3. Where a judgment was obtained against husband and wife in trover, and the plaintiff entered his judgment that the wife should be amerced; and it was held ill, for the wife could not pay without the husband, and the judgment should have been that they should both be amerced. *Wood & Ux. v. Doctor Suckling.* 2 *Cro.* 432. P *396.

4. Where the judgment was, that the plaintiff should recover his horse or damages; it was held ill, and the judgment was reversed. 1 *Cro.* 116. *Knight v. Bourne.*

5. Before the act of the 4th and 5th of King William the third, it was held where three plaintiffs brought an action of trover, and one of them died before verdict, that the action abated. *Raymond* 463. *Wedgewood and others against Bayly and others.*

6. A judgment was reversed *nisi*, because it was entered, that the jurors, in giving their verdict *dixerunt pro querente*, and in the awarding of the *venire* it was said, *ideo præcepti fuit*, &c. without any more. *Stile* 195. *Batistford v. Yate.*

7. In trover and conversion of 2000 loads of coals; upon not guilty pleaded, the defendants were found guilty severally for several loads of coals, and were found severally not guilty for the residue, and judgment accordingly, and entire damages; and one *ideo in misericordia* against the defendants, and one *ideo in misericordia* against the plaintiff, *pro falso clamore*; and thereupon a writ of error was brought in the exchequer-chamber; and the error assigned, because the judgment was against both the defendants, for several damages, severally; for it was alledged, that several damages ought not to be assessed; but there being a joint trover and conversion laid to their charge, they ought to have been found guilty; and they ought not to have been divided in the verdict, and in the assessing of damages; and if they might be severed, yet the plaintiff ought to have but the damages given against one of them, as it is in Sir John Heydon's Case. *Coke Rep.* 11. fol. 5. and 44. *Ed.*

3. 7. But all the justices and barons agreed, that the plaintiff should have several damages; for being found severally guilty of several parcels converted, he shall have judgment accordingly; and it is not like Sir John Heydon's Case, where there was but one joint and sole trespass of battery, and so found; and there, although the damages were severally assessed, yet the plaintiff ought to take his judgment for damages but of one: but because the trespass is several, and so found, *viz.* the one at one time, and the other at another, although it be contrary to the supposal of the writ, yet being found by verdict, it shall not abate the writ; and the plaintiff shall recover according to the verdict, as it is there said in the same case: so here, this being severally found, and the conversion by them severally of several things, the damages are well assessed severally, and he shall have judgment against them severally for damages,

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damages, according to the verdict: and it was said, that there were divers precedents in the King's Bench, and Common Bench, to that purpose. The second error assigned was, that there ought to have been several judgments *de ideo in misericordia* against the defendants; and it being otherwise it is error. But against that it was resolved, that there shall be but one judgment only of *misericordia*, although the defendants be severally found guilty; and so are the precedents; whereupon the judgment was affirmed. *Vid.* 44 Ed. 3. 6. & 6. 9 Hen. 6. 2, 22. *Affis.* 76. 3 Cro. 54. *Player v. Warn and Dewes.*

P *397. 8. Trover by five; and before verdict one of them dies, and they proceed to trial, and verdict for the plaintiffs; and then the plaintiffs suggest, that one of them is dead, and pray judgment for the rest, and had it; and the defendants bring a writ of error; and assigned for error, that the party died before verdict, and so verdict was given for a dead person. And after argument at the bar judgment was reversed; because every man shall recover according to the right which he hath at the time of the bringing the action; and therefore, if the heir brings an ejectment, and his ancestor dies subsequent to his action, he shall not recover. And in this case, although the plaintiffs were jointenants, and had a capacity of having the whole survive; yet in truth, every one had but a moiety, and so were not at the time of the action entitled to so much as they were after the death of one of the plaintiffs. And as to the case of 2 Bulst. 262. *Spring's* case, he reports the reason of the judgment to be, because by the death of the one the action survives to the other: but he mistakes the reason, as appears by *Read* and *Readman's* case. As to the cases where trespass is brought against many, and one dies, they differ much from this case; because there the trespass is joint or several, at the pleasure of the plaintiff; as to the case of a replevin, 3 Cro. 574. though an avowant is to some purposes a plaintiff, yet he doth not bring the action; and so not within the rule, that the same right must continue, which was at the bringing the action; and so judgment was agreed to be reversed by the opinion of three against *Dolben*, who desired time to consider. *Raym.* 463. *Wedgewood* and others *v.* *Baily* and others.

9. *Bigg* brought an action of trover and conversion of a horse, and had a verdict and a judgment. The bail for the defendant in the action brought a writ of error to reverse this judgment given against the principal. The court was moved to abate the writ; the court answered, if the writ of error be brought upon the principal judgment it ought to be abated. It hath been a question heretofore, whether a writ of error brought upon the principal judgment, and also upon the judgment given against the bail together, be good in part, and ill for the other part? But of late times it hath been ruled, that it ought to abate for all. Therefore

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let the party shew cause why the writ should not be abated here.
Style 174. Shayler v. Bigg.

10. In an action of trover and conversion and the declaration upon the imparlance-roll had spaces for the day and year, of losing, finding, and conversion of the goods; but the issue-roll, and all the rest, were perfect in this point.

And the court was of opinion, that the imparlance-roll could not be amended, and made perfect by the issue-roll, because it was the original, and was to warrant the other, and not *e converso*. But yet because upon issue not guilty, a verdict was given for the plaintiff, the court gave judgment for him; because the declaration, as it was found in the imparlance-roll, was good enough in matter; for the trover and conversion was laid in the *preterperfect tense*, and so before the action brought; and so the fault in the declaration being but in form, was holpen by the statute of *Jeofails*. *Hob. 76. Parker v. Parker. S. C. Hutt. 14. S. C. 1 Bro. 9.*

11. In trover and conversion of goods in the King's Bench; the defendant pleaded not guilty; the plaintiff had a verdict and judgment: the defendant brought a writ of error and assigned two errors; the one, that there was no bill filed; the other, that there was no bail. And upon a *certiorari* in that case awarded and returned, it was certified, that there was neither bill nor bail filed; and the judgment, notwithstanding the said errors, was affirmed in *Cam. Scacc. Tr. Anno 17 Dom. Regis, viz. 5. die Julii in eodem term.* and the record and the proceedings on the same writ of error were remanded, *eod. Ter. in Banco Regis. qu. Vide tamen 16 R. 1. rot. 945. Banco Regis ubi tam prim' Judicium quam secundum intratur.*

1. The want of a bill being the original, was taken to be within the meaning and intent of the statute of 18 *Eliz. c. 14.* and remedied by the equity of that statute.

2. The want of the bails being filed was not material, because it might be that the defendant was in *Custod. Mar.* at the time of the plaintiff's bill exhibited, according as the said bill supposed. *Hob. 264. Willis v. Woodhouse.*

*Actions on the Case for Wrongs.

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This Action upon the Case for Torts or Wrongs, may be brought in the two following Instances.

First, For a damage wilfully done to the property of another, or otherwise arising from the disturbance of a person in the enjoyment of his rights and privileges, which the law takes all possible care to preserve and protect.

Secondly,

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Secondly, For neglecting to do that which by law, and the rules of justice one is obliged to do, whereby a man receives a damage, whether it be relating to his own person or property, or to the persons of those in whom a man has an interest, and whose welfare and preservation tends to his benefit and advantage.

Which two General Heads I shall reduce to the Three following Particulars.

First, *Nusances and Annoyances.*

Secondly, *Disturbances.*

Thirdly, *Negligence, and the Want of due Care of a Man's own Property.*

There is another species of this action for wrongs, which arises from a man's doing somewhat in such an ill and unwarrantable manner, as that by law, and the rules of justice, it ought to have been done in another manner, and by such misdoing the party receives an injury: but as this title of wrongs is more properly treated of in actions to be brought against persons of any trade, art, mystery or profession, &c. the reader is referred to that title.

And I shall thereto add such actions as are to be brought, by and against officers and persons in a public employment, all which are treated of in the following manner.

First, *Where the Action lies, and by and against whom.*

Secondly, *Of the Declaration.*

Thirdly, *Of the Pleadings.*

Fourthly, *Of the Trial, Evidence and Damages.*

Fifthly, *Of the Judgment and Execution.*

First, *Where the Action lies, and by and against whom.*

For Nusances and Annoyances.

1. A *nusance* is that injury which is done by one man to another; either to his house, lands or tenements; whereby he is obstructed or annoyed in the enjoyment of what he is possessed, or has a right to the use of, and may be either common and general, or special and particular. If the *nusance* be of such a nature, that it is a common and general prejudice to all the King's subjects, the proper remedy is by indictment, or presentment in the court-leet, and not by action: if it be of a particular nature, and any man is particularly injured by the erection and continuance of such *nusance*, the party

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party grieved may remove it himself, or bring this action; but if he removes it himself, it is *said he cannot bring this action; and if he removes it pending the action, it is likewise held, that the defendant in such action may plead that matter in bar; and if the defendant is too late to plead it, he may have an *audita querela*. 9 Co. 55. 5 Co. 191. F. N. Brev. 185. New Nat. Brev. 407, 408. P * 399.

2. If the *nusance* be a damage to a man's *freehold*, the party grieved, or his heir, or feoffee, may have a *quod permittat* against him that erected it, without any notice or request before to abate it; and against the heir or feoffee of him that so erected it, after a request made to him to remove it. New Nat. Brev. 429. 5 Co. 101. 9. 54. Dyer 313.

3. And this difference is likewise taken in the books, that if the party grieved hath the *freehold* in him, if he will not abate it himself, he must have an *assize of nusance*; but if the party grieved has but a lease for years, he must have this action upon the case. 5 Co. 73. 9 Co. 113.

4. Yet it was adjudged in the case of *Cartwell v. Church*, in an action to stopping up a way, that though the party grieved was entitled to an assize, yet he may have an action upon the case. And so the law is. Noy 97.

5 So in 3 Leon. *Leverett v. Townsend*, there an exception was taken to a declaration for disturbance of common; that it appeared the plaintiff was seised in fee, and therefore ought to have had an assize, and not an action upon the case; but the exception was disallowed. 1 H. 4. 11. 8 Eliz. Dyer 250. 11 R. 2. Title *action upon the case*. See more concerning this particular point in 1 Roll's Abr. 164. Letter L. per tot'.

6. The nature of a *nusance* is such, that if it is necessary and beneficial to him who made it, and another buys the land in which the *nusance* is made, in such case the *nusance* is purged; and if afterwards the lands come into different hands, it is not abateable; but if it is an unnecessary *nusance*, it is only a suspension thereof, while it continues in one person; and when afterwards it comes into different hands, it is abateable. Carthew 272. Reynolds and Clarke.

7. If *A.* stops up my way, and lets the land to *B.* an action lies against *B.* if he does not remove it, because he continues the wrong. But if *A.* builds a house, and lets it to *B.* in that case *B.* cannot pull down this house to lay open my way; for this would be a waste in *B.* and therefore no action lies against *B.* for not removing this, which is to me a *nusance*. Trin. 13. Jac. 1. Bold's Case.

8. *R.* brought an action against *B.* and the case was, that *R.* prescribed to have a light time out of mind to his messuage whereof he was seised in fee; and one *H.* was seised in fee of land adjoining, and he erected a shed upon his land, whereby he hindered the light from coming to the plaintiff *R.* and afterwards made a lease for

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for years to the defendant *B.* and the plaintiff having brought an action against *B.* for not removing this shed ; *it was held* that this action would not lie, because the lessee had done nothing, but continued it as he found it ; and if he had abated it, an action would have lain against him by his lessor, but the plaintiff might have had an assize against the lessor, or he might have stood upon his own ground, and have thrown down the shed. 1 *Roll's Rep.* 221. *Rippon v. Bowles.*

9. An action upon the case will lie for a tenant at will against another, who destroys his common with conies. *T. Jones* 5. *Timberley v. Graham.*

10. It lies for a stranger coming upon land where I have a right of common, and eating the grass, &c. by which I could not have my common in so beneficial a manner as I ought. *Crogate and Marys.* 9 *Co.* 111.

11. If a copyholder in a manor has right of common, and a stranger digs turf there, and carries it away, the commoner may have an action, though not for the digging and carrying away the turf, but for the horses and carts coming upon the customary lands, to the prejudice of his common. 1 *Roll's Abr.* 89. *pl.* 8.

P * 400. * 12. So if *J. S.* hath lands, near to the lands of *J. D.* in which several tenants have common of pasture, and *J. S.* stores his lands with conies, without a grant or prescription, so that the conies go into the lands of *J. D.* and eat his grass there, so that the commoners cannot have sufficient common for their cattle ; yet cannot a commoner have an action upon the case against *J. S.* for when the conies go out of his land, into the land of *J. D.* where the commoners have a right of common, the possessory property of those conies are in *J. D.* who is owner of the soil, and the commoners may kill them. *Hinsley v. Wilkinson,* 1 *Roll's Abr. f.* 90. *Letter N. pl.* 9.

13. And here it will be worthy our consideration to observe, that the bounds of all actions must be observed ; and there is this difference between trespass and trespass on the case, that the first is where the original act was a wrong in itself ; and the other where damages are consequential to a lawful act : As for instance, for a man to make a dam on his ground is lawful ; but if by making it, the water overflows his neighbour's ground, it then becomes unlawful ; and an action upon the case will lie for it. Therefore where trespass was brought for entering into a yard, and fixing a spout on his own house, and thereby casting the water on the plaintiff's stable, *per quod* the walls of the stable were rotted and spoiled, *ad dampnum* ; it was held, that in this case trespass would not lie for fixing a spout to his own use ; but if the plaintiff had any damage thereby, he ought to bring an action upon the case. *Modern cases in law and equity* 272. *Reynolds and Clarke.*

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So that from what has been said, it is plain a man may wilfully do a damage to a man, by obstructing him from the enjoyment of what he has a right to enjoy; though in that wherein he is so obstructed he may have no property or which may be the property of him who obstructs me, or may be the property of another, or belonging to no person whatsoever but the King, and is for the good of his subjects, all which have equally a right to enjoy it.

14. But if a man be injured in the enjoyment of that which he and all others have a right to enjoy; as if he be disturbed in the use of a common highway; or if a ditch be made athwart the way, so that he cannot pass, yet shall he not have this action upon the case, but an indictment must be brought for it; and the reason of it is to avoid a multiplicity of suits, and therefore the law has provided another remedy, (*to wit*) a presentment in the court-leet. *1 Roll's Abr. 8. Letter N. pl. 1.*

15. If the Lord of the manor prescribes to have the parson of the adjoining church, to read divine service in his chapel every Sunday, for him and his tenants, for failure herein by the parson, the Lord cannot maintain an action; so if any public way is stopped, no action will lie against him that doth it. But if it were a private chapel for him and his family; or in the other case, if the party had a particular damage by the stopping, he may maintain an action. *1 Cro. 664.*

16. And yet an action was held to lie, where the inhabitants of *Southwark* by custom, had a watering place for their cattle, which was stopped by *J. S.* it was adjudged, that every inhabitant might have an action, for else they would be without remedy, because such a *nusance* is not presentable at the leet. *Westbury v. Powell, Cro. Eliz. 664.*

17. And if a man receives any special damage by a *nusance* which is general, yet he may have an action for it; as if a man lays logs of wood up and down in a highway, and a man riding there is thrown off his horse, and receives a damage, he may have an action. *1 Roll's Abr. f. 8. Letter N. pl. 2.*

18. So if a man agrees with me, that I shall set the outer wall of my house upon his land, and do it accordingly, and afterwards the party which granted me the license breaketh it down, if the grant were by **deed*, I may have an action of covenant, and if by deed *P *401*, poll, action upon the case. *Ibid.*

19. If a man possesses two pieces of land, and a stranger has a right to one of them, and the possessor builds a house upon this land, part of the house stands upon one piece, and part on the other, the stranger recovers his piece of ground, the other pulls down part of the house that stands upon his part, the stranger may have an action upon the case. *Pop. 15.*

20. If a highway be so stopped, that a man is delayed in his journey, and by reason thereof he is dampnified and hindered in some

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some important affair, yet this is not such a special damage, for which an action upon the case will lie, but a particular damage to maintain this action ; for a crime otherwise indictable must be direct, and not consequential : As for instance, the loss of his horse, or by some corporal hurt received in a fall off his horse. *Paine and Patrick. Pasf. 2 W. & M. Roll. 13, Carthew 194.*

21. The case above-mentioned in *Carthew* is thus reported in 4 *Mod.* The declaration was, that the plaintiff was an inhabitant in an antient messuage in such a vill, and that there was an antient ferry-boat kept there by the owners thereof till the first day of *May*, in such a year, after which day the defendant, who ought to keep it up did not ; and that all people used to pay for their passage, except the inhabitants of *L.* of which the plaintiff was one ; but the action was brought for not keeping up the ferry, by which the plaintiff lost his passage. The defendants plead by way of protestation, that there was no such custom, &c. and that the plaintiff was not an inhabitant ; and for their defence they plead, that before the exhibiting of the bill, they erected a bridge over the river, and that they maintained it at their expence, and that the plaintiff might have better past over that bridge. The plaintiff replies, that he was not permitted to enjoy the liberty of passing over any bridge, *secundum consuetudinem prædictæ in narratione prædictæ, &c.*

It was held in this case, that the custom was well alledged, both as to the manner and matter ; it is true, all customs must have reasonable beginnings, but it would be very difficult to assign a lawful commencement for such a custom as this, so it would be for the custom of gavelkind or burrough *English*, which are circumscribed to particular places ; and since it is sufficient to alledge a custom by reason of the place where it is used, it may be as reasonable in this case to say, that there hath been an antient ferry-boat kept in this place, it is but only an inducement to the custom, which did not consist so much in having a right to the passage, as to be discharged of toll.

This might have a lawful beginning, either by a grant of the Lord to the ancestors of the defendant, or by the agreement of the inhabitants.

A custom alledged for all the occupiers of a close in such a parish to have a foot-way, &c. is not good ; the reason is because the plaintiff ought to prescribe in him who hath the inheritance ; but where a thing is of no necessity, and no manner of profit or charge in the soil of another, but only a thing in discharge or for a way to a market, or to be quit of toll ; in such cases, not only a particular person, but the inhabitants of a vill may alledge a prescription. This may be as well alledged as a custom to turn a plow upon another man's land, or a fisherman to amend his nets there.

It is good as to the matter, for it is only an easement ; it is like a custom alledged for a gate-way, or water-course ; and for such things

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things inhabitants of a vill, or all the parishioners of a parish, may alledge a custom or usage in the place.

*But as to the plea in bar, it is not good, because the erecting of a bridge is but laying out a way; it is a voluntary act, and no man by reason of his own act, can be discharged of what he is to do upon the interest he hath in the ferry. P *402.

If the defendant had petitioned the King to destroy the ferry, and not a patent to erect a bridge, and had brought a writ *ad quod damnum*; and it had been found by inquisition to be no damage to the people, then he might safely have built this bridge.

But notwithstanding the plea is not good, yet the plaintiff can have no advantage of it, because he cannot have an action on the case for this matter; for by his own shewing it is a common passage, which is no more than a common highway. Now for disturbing him in such a passage, no action on the case will lie, unless he had alledged some particular damage done to himself; for if he could maintain such an action, any other person is entitled to the like; and this would be to multiply suits, which the law will not allow, but hath provided a more apt and convenient remedy, which is by presentment in the leet. 4 Mod. 294. 1 Salk. 12.

22. Though a way be a common highway, yet where a man dug a ditch, whereby the plaintiff could not carry his tithes, but was forced to go round about, whereby he was obliged to undergo a great deal of labour and pains to go round about; it was held a sufficient foundation for this action. *T. Jones* 156, 157. *Hart v. Basset*.

23. This special damage to be received, for which an action will lie, where a damage is done to a way or such like, must be particular to the party that receives it, and must be particularly set forth in the declaration; as where the plaintiff declared, that he was possessed of a colliery, and that there was a highway near, by which he used to carry his coals, and that he had a certain quantity of coals dug ready for sale; and that the defendant dug a colliery near his, and intending to draw away his customers, and deprive him of the profit of his colliery, stopped up the said way, so as carts and carriages could not come to his colliery; by which the plaintiff lost the profit of his colliery, and of his coals for want of customers. And all the court agreed, that where an action arises from a public *nusance*, there must be a special damage; for he that did the *nusance* is punishable at the suit of the public; and to allow all private persons their actions, without special damage, would create an infinite and endless number of suits.

And it was said by *Holt* and *Rokeby* Chief Justice *contra*, the plaintiff's near situation yields him a convenience, but no right; for it is in the King's highway, for the equal use and benefit of all his subjects; and the plaintiff has no more, nor better right than any body else: And they held, a man could not have a particular action, without a particular injury, or a particular right, which

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which are the grounds upon which all actions are founded, and to which they must conform. *Vide 2 Sand. 115. Cro. 664.* This plaintiff had neither a particular right in this way, nor a particular injury; for the stoppage is common to every one as well as to him, and an indictment is *ad nocumentum omnium subditorum per viam illam transeuntium*. And the cases cited on the other side were founded on a particular right. — As in case for a stoppage, where one has a way, a watercourse, or common to his house, mill or tenement, there the action is founded on a particular right, and lies without the *per quod*.

They held, that supposing that was a particular injury by special damage, that special damage is not sufficiently set forth; for it is not sufficient to say he lost customers, or buyers could not come, without shewing buyers were coming, and were hindered. *Vide 2 Lew. 214, 233.* and the case in *1 Roll 53.* has been often denied, and is not law; for the damage must be specially shewn where actions of themselves are not actionable. *1 Roll. 58, 111. 1 Cro. 140. 1 Roll. 34, 35, 36.* must shew who refused. And the Chief Justice cited the case of *Paine and Partridge, 2 W. & M. ** in his court, case for not keeping a ferry-boat, which was for all the King's people, paying a toll, but *gratis* for the inhabitants of such a village, of which the plaintiff was one; in this case the court held the custom to be good, but that the action did not lie; for though the plaintiff had a particular right, yet that consists in being exempt from toll, and not in passing, which is common to all; so that the not keeping the ferry is a public nuisance, for which the plaintiff cannot maintain an action more than any other person, but the defendant must be indicted.

The court being thus divided, and there being a former rule to stay judgment, no judgment could be entered; & *per cur.* if the court had been divided on the first motion, the plaintiff might have entered judgment, but now this rule must stand or be discharged; and discharged it cannot be, because the court is equally divided. *1 Salk. 16. Jevson v. Moor.*

24. If a man seized of a waste adjacent to a highway, digs a pit in the waste, within a little space of the highway, and the mare of B. escapes into the waste, and falls into the pit, and there dies, B. shall not have an action against A. for making this pit, because the special damage was by the default of the mare's escaping into the waste. *1 Roll's Abr. 8. Letter N. pl. 4.*

25. If a man anciently had ponds replenished by channels out of a river, he cannot change those channels, if thereby any prejudice accrues to another, but he may have the prefluxions of the river to feed his ponds; but *sic utere tuo ut ne lædas alieno.* *Het. 31. Duncombe v. Randall.*

26. If a man sets up a wood-pile against my house upon his own ground, whereby my light or prospect is hindered, I may have this action. *9 Co. 55.*

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27. The plaintiff counted that he was seised in fee of a kitchen, in the parish of *St. Dunstan's* in *London*, and prescribes to have windows into the backside of the defendant; and for stopping up a great part of the light, the plaintiff brought the action, and upon not guilty pleaded, it was found for the plaintiff. And it was moved in arrest of judgment,

First, That the plaintiff did not shew that the kitchen was ancient, but it was resolved that it was implied in the prescription; but *Williams* held this was not material, but *Crooke* was of a contrary opinion; for by the custom of the city of *London*, the light may be hindered, if it be not an ancient light.

Secondly, For the quantity was not shewed, and it was resolved it was not necessary. 4 *Co.* 49.

Thirdly, Neither shews he the parish in which the backside was; that objection was likewise not allowed, because the stopping of the light was the material point, and it was shewed there was; and that was held sufficient. *Ward v. Cheshire*, *Mich.* 9 *Jac.*

28. *A.* had an ancient house in *London*, *B.* builds a new house, which stopped up the light of *A.* and it was held. 1. That by the custom, a man cannot erect a new house where there was not one before, to stop up the lights of the ancient house. 2. Upon an ancient foundation, a man may erect a house, and stop up the ancient lights of his neighbour; for by the same reason as the neighbour erected his house more high, the other may at any time erect his; but he cannot enlarge his own in breadth or length, to stop up the lights of his neighbour. 22 *H.* 6. 15. *Hill.* 9. *Jac.* *Hughes v. Keme.* *Yelv.* 215. 1 *Bulst.* 125.

29. So an action was brought for stopping up lights; and it was agreed by all the Justices, that if two men be the owners of two parcels of lands adjoining, and one of them doth build an house upon his own land, and makes windows and lights looking into the other's land; and this house, and the lights have continued for the space of 30 or 40 *years; yet the other may upon his own land and P *404. soil, lawfully erect an house, or other thing against the said lights and windows, and the other can have no action; for it was his own folly at first to build his house so near to the other's land; and so it was adjudged upon this maxim in law, *cujus est solum ejus summitus usque ad cælum.* 1 *Cro. Bury v. Pope.*

30. Where the action was held to lie for erecting a bake-house against the bake-house of the plaintiff. *Cro. Eliz.* 203.

31. See more likewise concerning this action for a nuisance, in 1 *Roll's Abr.* 8. Letter *N.* per tot. *Danv. Abr.* 172. Title nuisance.

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For Disturbances, and other Violences committed against a Man's Property, &c.

1. If the lessor comes to the house which he has demised, to see if there be any waste done, or if it be out of repair, and is disturbed therein, an action will lie for this disturbance. *2 Cro. 478.*
2. An action upon the case will lie for a tenant at will against another, who destroys his common with conies. *T. Jones 5. Timberly v. Graham.*
3. An action upon the case lies for keeping a man out of a vestry-room, so that he could not be present at the electing a parish officer. *Modern Cases in Law and Equity 52. Phillipbrown v. Ryland.*
4. If a commoner be disturbed in his common he may have this action. *9 Co. 112. 8 Co. 79.*
5. If another's cattle be in my ground damage-fezant, and a stranger of his own head removes them, so that I cannot distrain them as damage-fezant, I may have this action. *Finche's Law 105. New Nat. Brev. 232.*
6. The parson may have this action against one that disturbs him in taking his tithes. *2 Co. Inst. 650.*
7. If I be bound to appear in a court at such a day, and before, or against the day, one causes me to be arrested on purpose, and out of malice to prevent my appearance, and to cause a forfeiture of my bond; I may have this action for my relief. *2. If the action lies.*
8. If one incloses common which should be open, or feeds the common, so that the commoner cannot enjoy his common in so beneficial a manner as he ought, every commoner may have this action. *9 Co. 113.*
9. If a man is disturbed in his fair or market in taking the toll, he may have this action. *9 H. 6. 45. Vide 21 H. 7. 16.*
10. And if a man has a market by prescription, and another erects a market to the prejudice of his antient market, the party injured may have his action. *Ray. 195. Yard v. Ford, 1 Lev. 296. 22 H. 6. 14.*
11. If a man has a seat in the church by prescription, and is disturbed, he may have this action. *1 Lev. 71.* and that without setting forth that he hath always repaired it.
12. If a man seized of lands in fee, makes a contract for a lease for years, and to deliver quiet possession to the lessee, and a stranger disseises him, he may have an action upon the case, shewing this special disturbance. *2 Roll's Rep. 254. Shotridge v. Hide.*
13. An action upon the case was brought by the master of a ship, setting forth, that he was detained in such an harbour ready to sail for *Dantzick*; and the defendant entered and seized the ship and detained

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detained the ship, *per quod* he was obstructed from making his voyage; though it was objected that the master had no property in the ship, yet it was held, that as he declared as a particular officer, he shall recover for his particular loss, and he might have maintained an action of trespass, as a bailiff of goods may. *Salk. 10. Pitts v. Gaince and Foresight.*

*This action is likewise to be brought for other violences to a man's property, that do not properly fall under either *Nusances, Annoyances or Disturbances*; as for example,

1. The lessor shall maintain this action against his tenant at will for a voluntary waste. *Lit. 15. a. 14 H. 8. 12. 5 Co. 13. a.*

2. But not for negligent or permissive waste, because he is not bound to repair. *8 Co. 13. b. Salop's Case.*

3. So hath it been held not to lie against a lessee at will, for negligently keeping his fire, whereby the demised premises were burnt. *Panton v. Isham, 3 Lev. 359. Hicks v. Downing, 1 Salk. 13.*

4. But it will lie by the lessee for years against his under-lessee, because the lessor himself is chargeable to his prior lessor, by reason of consequential damages; but why he, that hath the inheritance, cannot have it against the lessee at will, is because it was his own folly, that he would not restrain the lessee from permissive waste by proper covenants; and if the lessee for years should not have his action against his lessee, he would be without remedy. *4 Mod. 9, 10, 11. Cudlip v. Randall.*

5. Lessee for 20 years of a house, made a lease for half a year to J. T. and after the term ended, and before any entry by the lessee, J. takes away the planks, and other things from off the premises that were fixed to the freehold; and the lessee for 20 years brought an action upon the case against J. T. and it was held to lie. *W. Jones 224. West v. Trefusie.*

6. See where this action hath been held not to lie, for the father for beating his son, and making him lame, whereby he lost his marriage. *Cro. Eliz. 55. Gray v. Jefferies.*

7. This action will lie for him in reversion against a stranger for damages done by fire, though there be a term in *Esse*. *Panton v. Isham, 3 Lev. 360. 1 Salk. 19.*

8. After a bond was sealed and delivered, A. without the consent of the obligor, filled up some blank places, whereby the bond became forfeited and void, an action was held to lie for this against A. *Moor 547.*

9. It was adjudged that an action would lie for a parson against his predecessor for dilapidations. *3 Lev. 268. Jones v. Hill.*

10. It was adjudged that it would lie against a man for retaining another's servant, without laying any inticement, the defendant having notice that it was the plaintiff's servant. *2 Lev. 63. Farwell v. Beavers and his wife, 3 Keb. 59.*

11. That

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11. That this action will lie for the plaintiff in the action against a rescuer. *Hetley 95. Kyne v. Conningham.*

12. This action will lie for keeping a dog accustomed to bite sheep. See *Danvers's Abridgement, fol. 19. Letter H. pl. 1. per tot.*

13. But it was held that this action will not lie for a man's dog running at sheep, though he kills them, if it be without his consent. *Baker v. Weberley, Hetley 171.*

For Negligence, and the Want of due Care of a Man's own Property.

This species of the action upon the case arises from various instances of neglect; as for want of repairing a man's own property, for negligently keeping a fire, which for want of due care does a damage to his neighbour, and such like. For here it is not improper to take notice, that all men of this kingdom considered as members of one social body, which together constitute the commonwealth, are so linked together, that all their actions ought, and if rightly done, virtually do press towards the support and preservation of the whole; and therefore wherever a link is broken, which

P *406. thus binds together the several members of this commonwealth, by the depraved, or too selfish actions of any of the members of that society, there are, and always ought to be laws for the giving a remedy to the mischiefs that arise from such pernicious principles; from which it may be concluded, that each man's property, (when considered with regard to society) is from the frame and constitution of things, so far founded and created, for the benefit of society, that he himself has not such an absolute ownership therein, and power over it, as that he may permit it to be out of repair, or to want such due care and preservation, as that by the neglect thereof his neighbour receives an injury. To illustrate which the following cases are in point.

1. This action will lie against a man for not scouring his ditch, by which another's land is overflown with water. *Fitz. Nat. Brev. 88. 39 H. 6. 32. 11 H. 4. 82. 14 H. 8. 31.*

2. So in like manner it lies for stopping a ditch, by which another's land is surrounded. *Ibid.*

3. It lies against a man that ought to repair a mound or bank, by which another's land is drowned. *29 Ed. 3. 32. 10 H. 4. 7. Natura Brevium 99.*

4. It lies for not repairing a bridge, by which I have a way to my manor. *11 H. 4. 82. 45 E. 3. 17.*

5. In like manner it lies against one who ought to enclose against me, and does not, by which my grass is consumed. *11 Rich. 2. Action upon the Case 36. and that whether it be by his own cattle or a stranger.*

6. And

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6. And it lies against one who neglects to repair his house, for want of which it is ready to fall upon my house. 20 H. 7. 98.

pl. 4. So that it lies sometimes where a man is like to suffer damage by way of prevention of the wrong.

7. It lies against one that bought or sold in my market or fair without paying toll. 7 H. 4. 44. Inasmuch as this tends to my loss, and is an ill example to others.

8. It lies against one that will not deliver my pledge upon a tender of the money borrowed. *New Natura Brevium* 86.

9. It lies against a feoffee to a use, who doth not plead according to the directions of the feoffor. 14 H. 8. 24. pl. 2. *Sed quare de hoc*, since the statute of uses which executes the possession to the use.

10. An action lies for a parishioner against the parson for not carrying away his tithes, but suffering them to continue upon the land after notice. *Palmer* 341. *Wiseman v. Denham*.

11. An action lies for a parishioner against the parson, for not keeping his bull according to the custom of the parish. *Moor* 355. *Yeilding v. May*.

12. So an action will lie for the vendor against the vendee, for not removing of hay after it is sold. 13 H. 4. 48. *Palmer* 381.

13. An action upon the case was brought upon the custom of the realm, charging the defendant, that he so negligently kept his fire in his own close, that by the flames the plaintiff's corn was burnt in his close; and after a verdict, it was objected that the custom extends only to fire in a man's own house or curtilage; but that objection was not allowed of, for the fire in a man's field is as well his fire, as that in his house; and as he made it, he must see that it does no harm, and answer the damage if it does; for every man must use his own, so as not to hurt another. But if a sudden storm had risen which he could not avoid, that had been matter of evidence, and the plaintiff had his judgment. *Turbervil v. Stamp*. 1 *Salk*. 13.

14. J. S. with a gun at the door of his house shoots at a fowl, and by this fireth his own house, and the house of his neighbour; upon which he brings an action of the case generally, and doth not declare upon the custom of the realm, as 2 H. 4. viz. for negligently keeping his fire. *The question was if this action doth lie, and all the court held it did, for the injury is the same, although this mischance was not by a common negligence, but by a misadventure; and if he had counted upon the custom of the realm, as in 2 H. 4. the action had not been well brought; yet *consuetudo regni est communis lex*. 1 *Cro*. 10. P *407.

15. An action lies against a man, if his fire by misfortune burns the goods of another. 1 *Roll's Abr. f. Letter B. pl. 1*. So if it suddenly break out of his house, and burn the house of another, though he does not know it. *Ib. pl. 2*. So if done by my servant. *Ib. pl. 3. Poph. 143*. So if done by another entering my house by

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my leave, *pl.* 4. So if by my knowledge, *pl.* 5. Otherwise if by a stranger, *pl.* 6. It lies not against a man and his wife for the negligence of the wife, because the action lies against the husband as *pater familiæ*. *Ib.* *pl.* 7.

By and against whom this Action is to be brought.

1. In an action upon the case for a *nusance* erected; it was resolved *per totam curiam*, that where a *nusance* is made to the land of two tenants in common, that they shall join in an action; for it is personal, and concerns the profits of the land; and as they shall join in trespass, so they shall join in this action, but in forging a false deed they shall sever, for that concerns the inheritance of the land. It was also held, that for a *nusance* erected in the name of the devisor, and continued afterwards, (as this case was) the devisee shall join in the action, for the continuance thereof, is as the new erecting of such a *nusance*. 2 *Cro.* 231. *Some v. Barwisth.*

2. Where it was held to lie against the lessee for years, for continuing a *nusance*. *Brent v. Hadden*, 2 *Cro.* 373. *Rippon v. Bowles*, where the opinion of three judges against one was to the contrary.

3. Where it was held to lie against the master, for the improvident driving a coach by the servant, without laying that the master knew the horses were rude or ungovernable. 2 *Lev.* 172. *Mickel v. Alestree*. 3 *Keb.* 650.

4. Each inhabitant of a parish may have an action for a disturbance of a way to the church. 3 *Keb.* 28. said by *Hales* in the Case of the *King v. Thrower*.

5. Where it lies by the master against the servant for abusing his coach in driving it. 2 *Keb.* 16. *Cotes v. Sadler*.

6. Whether it may be brought by one partner of a ship against the other, for selling a sixteenth part. 1 *Keb.* 38. *Graves v. Saucer*.

7. Where it was held to lie for a commoner, for disturbance of his common. 9 *Co.* 112. *Crogat v. Marys*.

8. Where the husband claims common by reason of his wife's land, and is disturbed, he alone shall bring the action. 2 *Bull.* 14. *Baker v. ———*

9. Whether an action for disturbance of common will lie by a tenant at will. *T. Jones* 5. *Timberley v. Graham How.* 1 *Ven.* 274, 319. 2 *Ven.* 138, 185, 288, 290. 3 *Leam.* 206. 2 *Lev.* 148, 214, 233. 5 *Mod.* 206. *Salk.* 594.

10. The plaintiff alone brought an action on the case against the defendant, and sets forth, that he and his wife in her right, was seized of a messuage, bakehouse, and coal-yard, &c. and that the defendant had erected two houses of office near the said bakehouse that the walls became so foundrous, and the air so unwholesome

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that he lost his custom ; and that the defendant had digged a pit so near the coal-yard, that the walls thereof were in danger of falling ; and that he had built another wall so near the said messuage, that he had stopped an old light therein ; upon not guilty pleaded, there was a verdict for the plaintiff ; the court held, that where the action (if not discharged) shall survive to the wife, they ought both to join ; which if they had *done here, it would have been hard to have maintained this action, because entire damages are given ; and for losing this custom to this bakehouse, the husband alone ought to have brought the action ; he may bring an ejectment of the lands of his wife, but here judgment was staid till moved on the other side. 2 Mod. 269. *Frosdict v. Sterling.* P *408.

Other Instances wherein this Action for wrongs hath been held to lie, and where not, relating to the following Particulars.

Cro. Eliz. 574. *Willis v. Stroude.* For suing out a *capias ad tuis faciendum* after a writ of error.

Cro. Eliz. 628. *Baron v. Sleigh.* For suing out a *sci. fa.* against the plaintiff as bail for A. S. whereas he was not so.

Cro. Eliz. *Shelborn v. Harrison.* For procuring insufficient bail.

Cro. Cliz. 836. *Bray v. Patrid.* Suing for tithes before received.

Cro. Eliz. 838. *Kenton v. Wallinger.* For inserting the plaintiff's name in an instrument of excommunication.

Cro. Eliz. 659. *Harvey v. Newlyn.* For a disturbance of the plaintiff in his office of bailiff to a manor.

1 Ven. 295. *Anonymus.* For a damage received by the plaintiff's horse.

1 Ven. 98. *Sand v. Ford.* For erecting a new market.

3 Cro. 187. *West v. Trende.* By the lessor at will against his lessee, for pulling down the windows, &c. of his house.

3 Cro. 254. *Boulton v. Banks.* For keeping a dog accustomed to bite swine.

2 Cro. 567. *Garrett v. Taylor.* For threatening the plaintiff's workmen, so that they would not work.

2 Cro. 601. *Eyres v. Sedgwick.* For making an affidavit in a cause, charging the plaintiff with a rescue.

3 Cro. 387. *Hinsley v. Wilkinson.* For erecting coneyburroughs in a neighbouring wood.

3 Cro. 499. *Anonymus.* For diverting a watercourse.

2 Cro. 265. *Levson v. Kirke.* For not paying the duty for the plaintiff's goods, whereby they became forfeited.

2 Cro. 478. *Hunt v. Dorman.* For disturbing the plaintiff as a lord, in coming into a house to see if there was any waste.

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2 Cro. 373. *Ryppon v. Bowles*. For the continuance of a nuisance by the lessee.

Stile 164. *Ayre v. Pinchcomb*. By a commoner for surcharging of common, and treading the grass, &c.

Stile 3, 201, 202. *Watson v. Norbury*. An action brought for procuring a commission of bankruptcy to be taken out against the plaintiff, by virtue of which the defendant broke open the plaintiff's house, and took his goods, &c.

Stile 398. *Norton v. Jason*. Where an action was held to lie for the plaintiff against the defendant for assaulting his daughter, and getting her with child, *per quod* the plaintiff *servitium filie sue amisit*; after an action brought by the daughter, or she barred by the statute of limitations.

Stile 427. *Jones v. Graves*. Adjudged, that a man may bring an action upon the case, for entering upon the possession of a term, after the plaintiff had recovered it by a verdict.

Stile 230. *Sir Anthony Ashley Cooper v. Sir John* — Where the plaintiff shall have it in his election to bring this action, or an action of trespass. See the case before this.

Stile 99, 100. *Anonymus*. Where it was adjudged, that a man might bring an action of trespass, or on the case, for a rescue.

Stile 214. *Syms v. Wilson*. That this action lies upon the statute of monopolies.

P *409. *Whether it lies for printing, upon a suggestion, that the plaintiff had a patent for the sole printing of such and such books. *Earl of Tarmouth v. Darell*. 3 Mod. 75.

2 Lev. 196. *Virtue v. Bird*. For not appointing a place where the defendant should unload his timber, whereby the horses of the plaintiff in the cart took cold.

3 Keb. 753. *the Earl of Salisbury v. Selby*. For removing a *dead* out of the country.

3 Keb. 710. *Administrator of Calthorp v. Waymans*. By a patentee of an engine.

1 Keb. 577. *Hill v. Kirkman*. For breaking a wall, and making an open way between the plaintiff's house, and the street.

3 Lev. 209. *Biddlesford v. Onslow*. For diverting a watercourse brought by him in reversion.

Moor 449. *Beswick v. Comeden*. Where this action was held not to lie, but a *quod permittat* for erecting a pier in a river.

Noy 84. *Haman v. Whitbow*. Where the action was held not to lie for a tenant in common for disturbance.

Godb. 160. *Anonymus*. Where for disturbance of common.

Dyer 248. Whether this action, or an assize, will lie for diverting a watercourse.

Keb. 553. *Palmer v. Heslier*. Whether the action will lie for the lessee, against another lessee of the same lessor, for hindering the light, &c.

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Of Actions against Officers, for the undue Execution of their respective Offices.

Where the Action lies, and against whom it may be brought.

1. An action upon the case was brought for refusing to admit an attorney into a court that was held by prescription; where the plaintiff alledged that he was elected by the mayor, who had the election for 200 years and more; and it was held good. *Jones, Car. 2. 145.*

2. If one is committed upon an erroneous indictment, and the judgment is reversed or set aside, no action will lie against the judge or officer. *Mod. Rep. 119.*

3. An action upon the case will lie against an under-steward of a court-baron, for proceeding in a cause after a *habeas corpus* delivered to him. *3 Leon. 99.*

4. An action upon the case will lie against the *custos rotulorum*, for an amendment in a record, though there be no neglect in him, for he is at his peril obliged to preserve all the records in his custody. *1 Lev. 64.*

5. If an action upon the case will lie against a justice of peace, for refusing to examine one robbed according to the statute of hue and cry. *Vide 1 Leon. 124.*

6. An action will lie against the under-sheriff, as well as the sheriff, for not returning a writ. *1 Leon. 99.*

7. When it lies against the sheriff, and when against the gaoler. *Hard. 30, 31.*

8. If the sheriff arrests a man outlawed, and he returns a *cepi corpus*, and suffers him to escape, an action upon the case lies against the sheriff, and the plaintiff shall recover damages to the value of the debt. *Moor 641. Evans v. Williams.*

9. Where it was held to lie against the sheriff by the plaintiff, *qui tam pro domino rege quam pro seipso*, for an escape upon an *outlawry*. *Parkurst v. Powell, 2 Cro. 532.*

10. It lies against the sheriff that will not return an *outlawry*, *42 assize 12.* for though it properly concerns the king, yet the party may receive prejudice thereby.

*11. An action was brought against the sheriffs of London, for not levying goods by virtue of an *outlawry*; and the opinion of the court was, that the action would not lie for the party who sued out the *outlawry*, for the seizing of the goods, is to the king's use; but if it had been shewn, that the sheriff might have taken the person outlawed, and neglected it, there might be more reason to support the action. *2 Ven. 89. Dawson v. the Sheriffs of London.*

12. Whether

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12. Whether an action will lie against the sheriff for a false return upon an *outlawry*, and in what county. *Hob.* 209. *Parkhurst v. Powel*. So for not returning the outlawry. 1 *Cro.* 873. Clerk's Case.

13. If I deliver a writ to the sheriff to be executed, and before the party is arrested, I command the sheriff to discharge him of the suit; if the sheriff, notwithstanding such command, will arrest the party, he may have an action of false imprisonment against the sheriff. 2 *Cro.* 380.

14. So if the sheriff arrest the party and after there comes a *superfedeas*, and he still detains him; the detaining him is a false imprisonment. 2 *Cro.* 379.

15. It doth not lie against the sheriff for returning a *cepi corpus & paratum habeo*, though the party does not appear. 2 *Mod.* 85.

16. If a writ be directed to six coroners, and delivered to one of them, and the defendant in the writ is in his presence; if he returns *non est inventus*, the action lies against all the six coroners. 3 *Mod.*

23. *Naylor v. Sharplefs*.

17. Whether an action upon the case will lie against the sheriff for a double return upon an election of a member of parliament; it was adjudged by five judges against two, upon a writ of error in the exchequer chamber, that it would not. *Barnardiston v. Soame*, 2 *Lev.* 114. *Pol.* 470. 2 *Ven.* 37. *Onslow's Case*.

18. But see an excellent argument of my Lord Ch. Just. Holt upon that occasion, *Mod. Cases* 45. *Ashby v. White*; three judges were of opinion against the plaintiff, my Lord Ch. Justice's opinion for him; and the judgment of the court was reversed by the house of lords. 1 *Mod.* 85. 2 *Lev.* 69. 2 *Keb.* 866. 3 *Keb.* 72, 112, 135.

19. Where it was held to lie against the sheriff for executing writs in a liberty without a *non omittas*. *Atkins v. Clarke*. 1 *Ven.* 399. 1 *Lut.* 82. *Prideaux v. Morrice*.

20. An action will lie against the mayor and aldermen, and the sheriffs of London, for a false certificate of a custom, but not against the recorder. *Hob.* 87.

21. An action was brought by an executor against the sheriff, for a false return of a *fieri facias* in the life-time of the testator; and it was held to be within the statute of 4 *E.* 3. *cap.* 7. whereby it was enacted, that executors shall have an action for wrong done to the testator. 1 *Salk.* 12. *Williams v. Crey*, 4 *Mod.* 403.

22. If the ordinary admits a clerk contrary to the verdict in a *jure patronatus*, the patron, after a recovery against the usurper and his incumbent, may have an action upon the case against the ordinary. *Hob.* 317, 318.

23. An action was brought against the defendant; for that upon a *capias* directed to him against *J. S.* he being sheriff of *Essex*, directed his warrant to a bailiff of a liberty, to arrest the said *J. S.*

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who did so; and the defendant well knowing it, returned a *non est inventus*; the court held the action would well lie, but if the sheriff in this case had returned, that he had sent to the bailiff of the liberty, who had given him an answer, that he had arrested the body, it had been a good discharge to the sheriff, and process should have issued to the bailiff of the liberty to bring in the body. 1 Cro. 729. *Hawkins v. Mildmay*.

24. Though a plaintiff may bring an action of *debt* for an *escape* of one in execution, yet he hath his election to bring an action upon the case. *Hertford v. Gernon*. 1 Cro. 767.

*25. An action of escape was brought where the plaintiff declared, P * 411. that the defendant arrested a man upon a *Latitat*, and afterwards suffered him to go at large.

The defendant pleaded the statute of 23 H. 6. cap. 10. and that he took good and sufficient bail within the county according to the statute.

The plaintiff replied, that he let him go at large; *absque hoc*, that the defendant took good and sufficient bail within the county; upon a demurrer the court held, that this action would not lie; and North Chief Justice said, that the common law was very rigorous as to the execution of the *process*; the *Capias* was *ita quod habeas* the body of the defendant at the day of the return, and if the sheriff had arrested one it had been an escape. But this statute was made for the benefit of the prisoner, and the sheriff is compelled to admit him to bail, and he is a judge of their sufficiency, and therefore no action will lie if they prove insufficient; and see an excellent argument on this occasion, in 2 Mod. 180. *Ellis v. Yarborough*.

26. An action will lie against the old sheriff, for not delivering over a *superfedeas* to the new sheriff, whereby the defendant in the original action was taken in execution. 1 Mod. 222. *Calthrop v. Phillips*. 2 Mod. 217.

27. Case lies not against the sheriff, for not returning a *cepi corpus & paratum habeo*, though the party doth not appear; if the sheriff pleads the statute of 23 H. 6. for taking bail. 2 Mod. 83. *Page v. Tulse*. So if he returns *languidus in prisona*. 1 Cro. 852. *Boles v. Lascells*.

28. An action of escape was brought against one, for suffering the defendant to escape, the *process* was in an inferior court, upon a bond not made within the jurisdiction of the inferior court, and therefore it was adjudged to be no escape. *Squibb v. Holt*, 2 Mod. 29.

29. It lies against a gaoler that suffers one to escape taken upon a *capias*, or a *statute merchant*, by the conuzee of the statute, at whose suit the prosecution is. *New Nat. Brev.* 211.

30. It lies against the sheriff that suffers one to escape upon a *capias ad computandum*, for he shall not have an action of debt, because there is no duty certain. 15 E. 4. 19. 16 Ed. 4. 2, 3. *New. Nat. Bre.* 211.

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31. It lies against the sheriff, for making another return than the bailiff of a liberty made to him. 36 H. 6. 1. 30 *Affes.* 5 *New Nat. Brev.* 211.

32. It hath been said to lie against him, for returning a person upon the inquest, that is privileged by a charter. 19 H. 8. 5. But see *poslea pl.* 37, 47. where it appears this is not law.

33. It lies against the sheriff, for returning cattle estrayed that are dead. 32 H. 6. 27.

34. It lies against the sheriff for returning a *devastavit* where there was none. 11 H. 6. 37. b.

35. An action on the case was brought against the sheriff, who returned to a *latitat*, that he had taken the body, and had the body ready, &c. whereas in truth he had not the party, whereby the plaintiff lost his suit; the defendant demurred, and it was adjudged for the plaintiff; for by the demurrer he had confessed the false return, and the plaintiff's loss; but if he had pleaded the statute of 23 H. 6. it would have been a good bar. *Moor* 428. *Laughton v. Gardiner.*

P *412. 36. An action upon the case was brought against the defendant, who was bailiff of *Northampton*, and received a warrant upon a *feri facias*, to be executed within that vill, which bore telle *tres trin*, returnable *octabis Mich.* (which at that time of day was a return) and at *Michaelmas* he was removed from his office of bailiff, and yet made a return for the sheriff in his name and the name of his companion, that the defendant had no goods or chattels, &c. upon which the sheriff returned the *writ, a *mandavi ballivo qui illi nullum dedit responsum*; and this matter being found by a special verdict, it was adjudged for the defendant; for the return, although it be false, yet it was no return, because it was made by one that was an officer at the return of the writ; but if he had executed the writ before *Michaelmas*, and returned it to the sheriff, the sheriff might have made a return accordingly; although the bailiff was removed before the return of the writ, but as he did not execute it, and was removed before the return of the writ, he could not make a return of the writ to the sheriff, that the defendant had no goods, &c. because it might be he had none at the time when he was an officer, and perhaps he might have some after his removal, and before the return; but the court held, that if the plaintiff had brought an action against the bailiff, and laid the ground of his action to be for his neglect in not executing the writ; it had been good, and the court likewise held, that an action would have lain against the sheriff, for making the return of a bailiff, who was no bailiff at the time of the return, and for the sheriff's not executing the writ; and they held clearly that an action was maintainable against the bailiff of a franchise for a false return, and not against the sheriff. *Moor* 431, 432. *Palmer v. Porter.*

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37. If a sheriff or bailiff, upon the delivery of cattle to the plaintiff in *replevin* takes no sureties, or money in lieu thereof, the action lieth against him. 3 *Cro.* 446.

38. A gaoler takes from the bailiff a person arrested out of his jurisdiction, &c. if an action of false imprisonment will lie against the gaoler. *Raym.* 468.

39. If one has a privilege not to serve as a juror, and the sheriff summons him on the jury, no action lies against the sheriff for so doing. 1 *Syd.* 244.

40. If a judge commits a juryman for giving a verdict against evidence, though this commitment be illegal, yet no action lies against the judge. 2 *Mod.* 29.

41. An action was brought against an attorney for entering up a judgment before the rules were out, by which he was prevented of moving in arrest of judgment; and it was adjudged to lie. *Ray.* 164.

42. An action will lie against a sheriff, for not executing a writ when he might. *Mod.* 432.

43. An action will lie against the bailiff of a liberty for concealing his warrant, and not certifying what is done upon it. 1 *Roll's Rep.* 178.

44. It will lie against a summoner, for returning one summoned, by which the party is excommunicated, when he was not summoned at all; or against the archdeacon for not inducting, but not against the ordinary, for not instituting; for he may have his *quare impedit*. *Moor.* 835. *Poole v. Godfrey.*

45. An action lieth not against a sheriff for taking insufficient bail, he being a judge thereof. *Hutt.* 120. *Antea pl.* 23.

46. If by the custom of a manor, a copyholder for life is to name his successor, and the copyholder according to the custom names his successor, who after the death of the copyholder comes to the Lord, and prays to be admitted, and the Lord refuses him, yet no action will lie against the Lord. 2 *Cro.* 368. 1 *Roll's Rep.* 125. *Moor* 642.

47. It lies against a bailiff for concealing a *feri facias*, after that he hath levied the money thereon. *Bell v. Catesby.* 1 *Roll's Rep.* 78.

48. It lies not against the sheriff, for returning a man upon the jury, who lives in a place exempt from that duty. 1 *Roll's Rep.* 119. The town of *Darby v. Foxley.*

49. It lies against the ordinary for not inducting the clerk. 1 *Roll's Rep.* 125. Cited in the case of *Ford v. Hopkins.*

*50. It lies not against the lord of a manor, for him who is named P * 413. by the copyholder to be his successor. 1 *Roll's Rep.* 195. *Forde v. Hopkins. The same Case.*

51. It lies not for not attorning tenant, or for not making livery, or for any such matter which is *dampnum sine injuria*. 1 *Roll's Rep.* 196. *The same Case.*

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52. It lies against a judge of an inferior court, for refusing a plea, which by law he ought to accept of. 2 *Roll's Rep.* 408. *Curriton v. Killigrew.*

53. Where it was held to lie against the Mayor of L. for not granting a poll upon a doubtful election. 1 *Ven.* 206. *Sterling v. Turner.* v. 2 *Ven.* 26. 2 *Keb.* 26.

54. Whether it lies against an alderman, for procuring a false return of a *Mandamus.* 3 *Keb.* 859. *Enfield v. Hills.*

55. It lies against a sheriff that will not execute *process*, the party being shewed to him, for justice is thereby delayed. 14 *H.* 7. 23. 8 *E.* 4. 14, 17.

56. It lies for the plaintiff against the sheriff, that will not return his writ. 2 *H.* 6. 5. 8 *E.* 4. 14, 7. for he is thereby hindered in his suit.

57. It lies by the master of a servant against the gaoler, that suffers one to escape who is committed upon the statute of labourers. 14 *H.* 6. 8.

58. It lies against a commissary that returns a *jure Patronatus* otherwise than it was found. 22 *H.* 6. 30.

59. For returning a man summoned that was not. 26 *Affise* 48. 1 *H.* 6. pl. 4. or where he was not summoned in a reasonable time, for that is all one in the eye of the law, as though he had not been summoned at all. 39 *E.* 3. 7.

60. Where the action was held to lie for two churchwardens against the surrogate, for a false return of a *mandamus.* *Ward* and others against *Brampston.* 3 *Lev.* 362.

61. Where an action was held to lie against an attorney, and two others, for appearing without a warrant. 5 *Mod.* 205. *Stephens v. Squire.*

2 *Cro.* 360. *Barret v. Winchcombe.* When it hath been held to lie for an escape upon an *outlawry.*

2 *Cro.* 380. *King v. Andrews.* For an escape on *mesne process.*

1 *Cro.* 175. *Marsh v. Aftry.* Where the action hath been held to lie against the under-sheriff, for not returning a writ of summons in a writ of entry. 1 *Cro.* 175.

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For Disturbance of Officers in the due Execution of their Offices, or for doing somewhat, whereby they are prevented from the due Execution of the laws.

Where the Action will lie, and against whom.

1. An action upon the case was brought against the defendant, for that he had taken away his goods, and had hidden them in such secret places, that the plaintiff could not come at them to take them in execution; but it was adjudged that the action would not lie. 1 *Mod.* 286.

2. Where it was held not to lie for shutting the door against the sheriff, who came to take goods in execution. *Moor* 668. *Semayne v. Gresham*.

3. An action upon the case lies for the keeper of a forest, against him who disturbs the keeper in taking the profits due by prescription to his office; but he ought to declare upon the certainty of the profits which happened, that he might have adequate damages. *Moor*, *Berkley v. the countess of Pembroke*.

*4. It lies for the plaintiff in the action against a person that rescues another on *mesne process*, whereby the plaintiff lost the benefit of his action. 2 *Cro.* 485. *Hodges v. Marks & al* P *414.

5. So where it was held to lie for the plaintiff against the rescuers of a person taken in execution, upon this reason that he is the party who hath the loss, and to whom the injury was done; wherefore in reason he ought to have the action, and not be enforced to sue the sheriff; for perhaps the sheriff is dead, and then no action lies against his executors; wherefore it is just that the plaintiff should take his election; and if he recover, the parties may plead it if they be sued by the sheriff, so as there is not any danger of being double charged; wherefore it was adjudged for the plaintiff. 3 *Cro.* 109. *Mynn v. Coughton and his wife*.

6. Where it was held to lie for disturbing the under-steward of a manor. *Cook v. Younger*, 3 *Cro.* 16.

7. Where it was held to lie for disturbance of the plaintiff, as official to the archdeacon of the spiritualties. 3 *Cro.* 258. *Walker v. Sir John Lamb*.

8. Where it was held to lie for disturbing the plaintiff, in his office of register in *Rochester*. 3 *Cro.* 279. *Young v. Stool*, March 38.

9. Whether the action will lie for disturbing the plaintiff in exercising the office of the registership, of policies of insurance in *London*, and taking the profits thereof. *Hard.* 351. *Veale v. Priour*.

10. Where

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10. Where it was held not to lie for a disturbance of the plaintiff in making bills, and bonds, which the plaintiff claimed by a grant. *W. Jones. 233. Farwkner v. Bellingham.*

11. Where it was held not to lie for disturbing the plaintiff in his office of marshal of the King's bench, for that a grant to him for years was void. *Meade v. Lenthal, W. Jones 463.*

12. Whether it lies for a water-bailiff disturbed in his office. *1 Keb. 323. Thorp v. Bayly.*

13. That it lies for the clerk to the constable of *Windsor*, for a disturbance in his office. *2 Keb. 264. Taylor v. Staples.*

14. That it lies for the steward of the bishop's courts. *1 Cro. 636. Scambler v. Waters.*

15. Where this action hath been held to lie against the defendant for an escape from an execution. *1 Cro. 237. Salteston v. Payne.*

For other cases wherein this action hath been held to lie against sheriffs, and other officers, and where not, *vide*

1 Roll's Abr. 93. Letter Q.

Danver's Abr. fol. 183. Letter Q. R.

1 Roll's Abr. fol. 98. Letter B. C. E. F.

Of actions against Persons of any Profession or Trade, for the undue Exercise of such profession or Trade.

Where this Action hath been held to lie, and by and against whom. Against an INNKEEPER.

1. It lies against a host who refuses his guest, under pretence that his house is full of guests. *Roll's Abr. fol. 3. Letter F. pl. 1.*

2. But it is a good plea at bar that his house is full, and he had no room, for he is not bound to provide lodgings out of his house. *Dyer 158. pl. 32.*

3. If a traveller comes to an inn to lodge, and the innkeeper appoints him a chamber for his goods to be put in, and after the guest is robbed, he shall have this action. *1 Roll's Abr. f. 3. Letter F. pl. 2. 8 Co. 32. 4 Leon. 96.*

4. If the innkeeper is not at home, or goes abroad while his guest is in his house, yet he must answer for the goods of his guest, if they are stole. *1 Roll's Abr. fol. 4. Letter G. pl. 3, 4.*

P * 415. * 5. But if he tells his guest he is going abroad, and therefore cannot attend him, and the guest takes up his lodging there, if his goods are stole the innkeeper is not chargeable. *Ibm. pl. 2.*

6. If the innkeeper refuses his guest because his house is full, and the guest says he will shift among the rest of his guests, and he is robbed, the innkeeper is not chargeable. *Ibm. pl. 1.*

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7. If the innkeeper bids his guest put his goods into a particular room, and that then he will warrant them safe, otherwise not, and the guest permits them to lie elsewhere, the innkeeper shall not be chargeable if the goods are stolen. *Dyer* 266. *b. vide Moor* 7, 158. 8 Co. 33.

8. If the innkeeper asks his guest what money or goods he has, and the guest tells him none, or less than he hath, and afterwards they are lost, the innkeeper is not chargeable. *Moor*, 158. and 8 Co. 33.

9. If the innkeeper delivers the key of the chamber to his guest where the goods are put, and the guest leaves the door open, and the goods are stolen, yet an action lies against the innkeeper. 8 Co. 33.

10. If the guest is robbed by his servant, or by any other person which he brings with him, the innkeeper is not chargeable. 8 Co. 33.

11. If a man comes to an inn, and desires his horse to be put to grafs, and he is stolen from the field, the innkeeper is not chargeable; but otherwise if the innkeeper sends him to grafs of his own head. 1 *Roll's Abr. fol.* 4. Letter. *F. pl.* 3, 4.

12. But if the innkeeper, at the request of his guest, puts his horse to grafs, and he is stolen through wilful negligence, the innkeeper is answerable. *Ilm.* 5.

13. The innkeeper is not bound to receive a horse of a person who does not lodge at his inn. 2 *Brownl.* 254. Nor is he bound to let the guest, or his horse have provision, unless he is paid for it before-hand; for the innkeeper is not bound to trust his guest. *Bro. action upon the case*, 76. 9 Co. 87. *b.*

14. The innkeeper is not answerable for the person of the guest, if he be beaten in the inn. 8 Co. 32. *b.*

15. The foundation of this action is upon the custom of the realm, for the preservation of the goods of travellers that come to an inn to lodge, and therefore these four things are to be observed. 1. That it must be a common inn. 2. That the party be a travelling guest. 3. That he lodge at the inn. 4. That the goods of the guest are in the inn, as goods of a guest; for wherever either of these fail, the action will not lie.

To illustrate which, see the following cases.

16. If a man takes down his sign, he discharges himself from being reputed a common innkeeper. 2 *Roll's Rep.* 345, 346. But if afterwards he makes it a common practice to harbour people that are travelling, he shall be reputed a common innkeeper. *Ilm.*

17. If one that is not a common innkeeper be assigned *per Hospitorem domini regis*, to harbour a person, he is not bound to take charge of the goods of the guest. 1 *Roll's Abr. fol.* 2 Letter *D. pl.* 4. *New Dyer* 158. in the Margin.

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18. If a man comes to an inn, and leaves goods there, and goes away, and comes about two or three days after, and in the mean time the goods are stolen, the innkeeper is not chargeable, for the party was not his guest. 1 *Roll's Abr. fol. 3.* Letter E. pl. 2.

19. But otherwise if he comes again the same night. *Moor* 877. *Pop.* 179. 2 *Brownl.* 255. *New Dyer* 158 b. *Cro. Jac.* 188. *Latch* 127.

20. And otherwise if the innkeeper promises to keep them safe. *Cro. Jac.* 189. And it is said in this book, that the action ought in this case to be grounded upon the special promise, and not upon the custom of the realm.

21. If a man leaves his horse at an inn, and goes away two or three days, though neither himself or servants lodge there, he shall be reputed a guest. 1 *Roll's Abr. fo. 3.* Letter Q. pl. 3. *Cro. Jac.* 189. *Moor* 877. *Noy* 126.

P * 416. * 22 If an innkeeper invites a man to supper, and he stays there all night, if he is robbed the innkeeper is not chargeable, because the party was no travelling guest. *Ibm. pl. 4.* 2 *Brownl.* 214. 8 *Ca.* 32.

23. If a man takes my horse and rides him into an inn, and he is there stolen, I cannot have an action, because I am not a guest. *Ibm. pl. 6.*

24. Otherwise if my servant comes to an inn upon my horse about my business. *Ibm. pl. 7.*

25. If A. comes to an inn, and stays there a week, or longer, he shall be reputed a travelling guest. *Latch* 127.

26. But if an attorney comes to an inn, and he hires a chamber there for the term, and is robbed, the host is not chargeable. *Moor.* 877.

27. If goods are delivered to an host upon another account, than merely as the goods of his travelling guest, he is not answerable. 1 *Roll's Abr. fo. 3.* Letter E. pl. 1.

Against a CARRIER.

Vide JONES on Bailment Per. Tot.

28. If a man delivers goods to a common carrier, to carry them to a certain place, and he loses them, or is robbed of them, an action upon the case will lie against him, upon the common custom of the realm; for the law implies his undertaking to carry and deliver them safe. 1 *Roll's Abr. fo. 2.* Letter C. pl. 1, 4.

29. And though he be no common carrier, yet if he takes hire, he is to be charged upon a special *assumpsit*. *Cro. Jac.* 262. *Rogers v. Head.*

30. A common hoyman is reputed a common carrier; and if a man delivers goods at York to B. who is a water-carrier between

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Hull and London, to carry those goods from *Hull* to *London*; though no mention is made of the carriage to *Hull*, yet if the goods be lost he shall answer for them; for upon his general receipt of them at *York*, he became liable. 1 *Syd.* 36. *Nichol v. Moore.*

31. A bargeman, and lighterman, are reputed common carriers, for this purpose. *Palmer* 528. 2 *Cro.* 330.

32. If a man delivers goods to a common hoyman to carry, and he fearing to carry them, delivers them to *J. D.* to carry, and gives notice to the party, if he barely assents thereto, that will not discharge the hoyman, unless the party actually discharges him of the carriage, and the discharge only is traversable. 2 *Cro.* 330. *Hob.* 17. 1 *Roll's Abr.* fo. 2. Letter *C.* pl. 4.

33. If *A.* delivers a box to carry, and the carrier ask what is in it, and *A.* tells him a *book* and *tobacco*, and in truth there is 100*l.* yet if the carrier is robbed, he shall be answerable for the money; for *A.* was not bound to tell him of all the particulars that were in the box, but the carrier might have qualified this general acceptance, as if the carrier had told the owner that it was a dangerous time, and if there were money in it he durst not take charge of it, that would have excused the carrier. *Allen* 93. *Henrig v. Eccleston*, 1 *Ven.* 238. *Morse v. Slue.*

34. And it is very necessary to understand the nature of this qualified acceptance; for if goods be delivered to a man to be safely kept, and after those goods are stolen from him, this shall not excuse him, because by the acceptance he undertook to keep them safely, and therefore he must keep them at his peril.

35. So it is, if goods be delivered to one to be kept; for to be kept, and to be safely kept, is all one in law; but if the goods be delivered to him to be kept, as he would keep his own, there, if they be stolen from him without his default or negligence he shall be discharged; so if goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged, because he hath a property in them, and therefore be ought to keep them no otherwise than he would his own; but if he that gaged *them, P *417 tendered the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged.

36. If *A.* leaves a chest locked with *B.* to be kept, and taketh away the key with him, and acquainteth not *B.* what is in the chest, and the chest, together with the goods of *B.* are stolen away, *B.* shall not be charged therewith, because *A.* did not trust *B.* with them, as the case is. And that which hath been said before of stealing, is to be understood also of other like accidents; as shipwrecks by sea, fire by lightning, and other like inevitable accidents. *Ca. Lit.* 89. *a. b.*

37. If a smith pricks a man's horse, an action lies against him. 1 *Roll's Abr.* fo. 91. pl. 15.

38. If

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38. If a common farrier kills my horse with bad medicines, an action lies against him without an express *assumpsit* to cure him. *Ibm. pl. 13.*

39. And if a person, though he be not a common farrier, promises to cure my horse of a distemper, if he kills my horse through an ill administration of his medicines, an action lies against him. *1 Roll's Abr. fol. 96. Letter. Z. pl. 6.*

40. If a servant who is my agent, sells an unsound horse, or other merchandize in a fair to a man, no action lies against the master, for he did not command his servant to sell it to any particular person; but otherwise it is, where he was directed to sell it to a particular person. *1 Roll's Abr. fo. 95. Letter S. pl. 1, 2.*

41. If a goldsmith makes plate, wherein he mingles dross, so that it is not according to the standard, and sends it by the servant, an action lieth against the master. *Cro. Jac. 471.*

42. If *A.* sells a horse to *B.* and warrants him to be *sound* of wind and limb, and his legs clear, whereas he well knows that he is *shoulder pitched*, and to have *splints* on his legs, an action lies against him on his warranty. But if *A.* buys a horse of *B.* who warrants the horse to have both his eyes, and the horse hath but one eye, *A.* can have no action; because the matter is not secret, but lies in the knowledge of the party, and it was his own negligence that he would not look thereto. *1 Roll's Abr. fo. 97. pl. 14. Cro. Jac. 386. Baily v. Merrel.*

43. An action will lie against a porter, carrier or bargeman, whether there be a special promise or no, upon his bare receipt of the goods, if the goods are lost by his negligence, as well as against a land-carrier. *1 Syd. 36.*

44. An action upon the case will lie against the servant by the master for bringing goods from *India*, by which the master broke his covenant, if it were done fraudulently, knowing of this covenant. *1 Syd. 298.*

45. If one promises to take up goods, and carry them to another place, and does it so negligently, that the goods are spoiled, an action lies. *Salk. 26.*

46. The master of stage-coach is not liable for goods lost by the driver, unless he takes a certain price for the goods. *Salk. 282.*

47. Whether a master of a ship shall be liable for goods that are stolen away from the ship, whilst the ship lay in the river, or not. *Vide 1 Mod. 85. Morfe v. Sluce.*

48. It lies not against the master of a barge, for goods thrown over board for the safety of the lives of the passengers. *1 Roll's Rep. 79. The case of the Gravesend Barge.*

49. It lies for a master against a surgeon, who undertook to cure his servant of a broken leg, and the surgeon misbehaved himself in his profession. *1 Roll's Rep. 124. Everard v. Hopkins.*

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50. It lies against a man for selling corrupt wines, though he does not warrant them to be good. 2 Roll's Rep. 5. *Southern v. Howe.*

51. It lies against a man for selling goods that are not his own. *ib.*

*52. It lies for not suffering the lessor to see whether waste be committed, or no. 2 Roll's Rep. 21. *Hunt v. Dadvers.* P *418.

53. Where it hath been held to lie for selling a counterfeit jewel. *Southerne v. Howe,* 2 Roll's Rep. 26.

54. There is a difference taken, where a thing is sold, which of right belongs to the vendor, and where to a stranger; for if the property belongs to a stranger an action will lie against the vendor, without any words of warranty. 2 Roll's Rep. 27.

55. It lies against a tradesman for putting another's mark to his own commodities. 2 Roll's Rep. 28.

56. Where it lies against the master of a ship for goods lost out of the ship. 1 Ven. 190, 191. *Morse v. Sluce.*

57. Where an action was held to lie against an attorney, for causing a *fieri facias* to be executed against his client, in an action wherein the defendant was attorney for the plaintiff. *Stile* 426. *Lawrence v. Harrison.*

58. It lies against an attorney that is retained, and makes default. *Lib Intro.* 2. A. Sect. 1. *Reg. Orig.* 113. A. If his client be prejudiced by it.

59. It lies against the *Clerke of Assise* that takes a fee, and enters not the jury. 34 H. 6. 4. for thereby the case is delayed.

60. My Lord Chief justice *Holt* was of opinion, against three other judges, that an action upon the case would lie against the postmaster general, for *Exchequer Bills* lost out of a letter delivered at the office at *London*, and he went upon this reason.

That he considered this as a letter lost in the office, and not upon the road; and held, the postmaster general was liable, because the care of the whole is committed to him, and the rest are but his deputies; for the law makes the officer, whosoever he be, responsible of consequence, both for himself and deputy; as the marshal or warden for a prisoner, or the sheriff for goods taken in execution, for which he is liable upon an *extendi facias* on the statute, as well as a *levari facias*, which is at common law, or for a prisoner in execution in debt, which is by the statute of 25 E. 3. cap. 17. as well as in trespass *vi & armis*, which is an execution at common law; and this shews, that the officer is in consequence liable, whether he become intrusted by common law, or by statute; and there is no need of a contract, for the law makes him answerable. 2dly, He has a reward which is the reason in the case of *inkkeepers*, *hoymen*, &c. who are bound to keep safely, and answer all neglects of those that act under them, and so they would be, though they should expressly caution against it; and this case is

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within the same reason with those cases that make men responsible for negligent keeping, *viz.* That if they could not be charged without assigning a particular neglect, they might cheat any man living, and it would not be in his power to prove it; it is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he shall never be able to prove it; it would be hard in this case, to put the plaintiff to prove a particular neglect among such a multitude of under officers; *ergo* the postmaster is to be charged with it.

2dly, *Exchequer-bills* are proper to be sent this way; for the words are general, any packets whatsoever, and these being new things is no argument against it; for new things may be governed by old laws, when they fall within the reason of those things, which were the subject matter of those laws at first: also when a man takes upon himself a public employment, he is bound to serve the public as far as his employment goes, or an action lies against him for refusing. Thus if a farrier refuses to shoe a horse, an inn-keeper to receive a guest, a carrier to carry, when they may do it, an action lies; their understanding is in proportion to their power and convenience. *Dyer* 158.

P*419. 3dly, If without this act, or before it, any person had voluntarily set up such a post-office, that person had been liable to an action, and consequently so is the postmaster; for all other people are excluded; the nature of the office is the same, and he is on the same terms.

4thly, Though the master be liable, yet *Breeze*, into whose hands the packet was delivered is chargeable also, but he is not chargeable as an officer, but as wrong-doer. It is upon this reason that an action lies against the gaoler, as well as against the sheriff for a voluntary escape, for it is in the nature of a rescue; but for a negligent escape the action lies only against the sheriff. 1 *Leon.* 146. 3 *Cro.* 175, 743. 1 *Roll's Rep.* 78. is ill reported. *Noy* 90.

5thly, What is done by the deputy, is done by the principal; and it is the act of the principal who may displace him at pleasure, even though he were constituted for life. *Hob.* 13. *Moor* 856. and the act of the deputy may forfeit the office of his principal. 39 *H.* 6. 34.

6thly, The king's discharge may be good against the king, as to his revenues, but not as to the subject, for it cannot hinder him of a remedy the law gives him. *Lane v. Cotton & al.* 1 *Salk.* 17.

61. It lies against a servant that will not do his service, for the master is thereby damnified. 2 *H.* 7. 11. b.

Secondly,

on Actions on the Case.

Secondly, Of the Declaration.

In Actions for Nuisances, Annoyances and Disturbances, and for other Wrongs.

1. It lies against a wrong-doer upon the bare possession only, and the plaintiff need not set forth whether he hath a title by grant or prescription, for that goes to the right. But if the declaration be for diverting of water *ab antiquo & solito cursu*, this amounts to a prescription, which must be proved at the trial, or the plaintiff will be non-suited. 3 Mod. 52. *Hebblethwaite v. Palmer, Skinner* 175. 2 Show. 243. The same case is reported in 1 Show. 64.

2. Yet in the case of *Palmer v. Keblethwayt*, 1 Show. 64. the plaintiff brought an action upon the case for diverting a watercourse from the plaintiff's mill, and declares only that the water *debet & solet currere*, and does not say that it was an ancient mill; it was answered, that this was only a possessory action, and that the plaintiff need not say any more. I do not find any judgment was given.

3. But in *Palmer* 290. in the case of the countess of Rutland v. Bowler, there is the same point settled; and it was said by justice Dodderidge, that if a man erects a new mill upon his freehold, and another diverts the course of the water from that mill, although it passes through a man's own land, yet if the water used to take that course, an action upon the case will lie.

4. Agreeable to which is the case of *Sands and Trefusis*, in 3 Cro. 575. Where an action upon the case was brought for stopping up a watercourse, running in the defendant's land to another ancient watercourse there running from his mill to the defendant's mill. In that case it was adjudged that the action well lies, though the plaintiff does not say that his mill was an ancient mill; and although he does not shew what estate he had, likewise in *Pos. 4 W. & M.* it was held, that to alledge, that water *currere debuit & debet*, is sufficient in an action for stopping a watercourse, without saying that it ever ran there, because it is a possessory action. *Jackson v. Savage, Pos. 4 W. & M. Carthew* 316. The same point adjudged in — and *Trip*.

5. And in the case of *Tennant and Gouldin*, in 6 Mod. 313. The lord chief justice was of opinion, that *solebat currere*, when it relates to water is sufficient, but to make use of that expression, in an action for not repairing *a wall, which was wont to be repaired, P *420. that word *solebat* is improper and insufficient; but in this case the plaintiff had judgment upon another matter, viz. because it appeared upon

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upon the face of the whole declaration that the plaintiff was entitled to an action. The case was, the plaintiff declared that he was possessed of a messuage situate in such a place, for a certain number of years, and also of a cellar, part thereof contiguous to a vault, part of the defendant's messuage, which was wont to be separated by a strong thick wall, part of the defendant's messuage; that for want of repairing this wall, the filth and soil of the said vault, flowed into the said plaintiff's cellar, &c. This declaration was held good, and the lord chief justice *Holt* said, that there always had been and then was a difference, between charging a wrong-doer, and the tenant of the land; for to charge a ter-tenant, one must make a title by grant or prescription, but none need be made against a wrong-doer; and formerly it was thought necessary to maintain an action against a ter-tenant for stopping up a way, to shew a title, but the contrary has been held since. *Brit v. Stroud*, 4 *Mod.* 418. 6. *Mod.* 19. and that as well on a demurrer as after a verdict; but says he, I know no case where one puts a charge upon any one, except it be of common right, but he ought to shew a title, as in the case of repairing one's house. But if I have an house-of-office in my ground walled, and no cellar contiguous to it, and another digs a cellar close to my wall, which stands well, till you have dug your cellar, it seems hard to bring a greater charge upon me, by his digging his cellar contiguous to my wall, whereby my wall is in its nature become weaker. Suppose one man has a house and cellar contiguous to it, and one wall serves for both, and he sells the cellar, who shall repair the wall; or suppose this cellar was made after the vault, and the wall thereof; for one party's making a wall, shall not take away the owner of the contiguous soil's liberty of digging a cellar, but such digging ought not to bring a greater charge upon the other.

And at another day the court held the declaration good, for there is a sufficient cause appearing in it, but not upon the word *solebat*; but if the defendant has a house-of-office enclosed with a wall, which is his, he is of common right bound to repair it, and he is to use it so as not to annoy another; and there is a great diversity between a prescription to put a charge upon a man to repair his fence, and to excuse one from a trespass, for such charge must be by prescription. But the reason here is, that one must use his own soil, as thereby not to hurt another; and as of common right one is bound to keep his cattle from trespassing on his neighbour, so is he bound to use any thing that is his, so as not to hurt another by such usage. If a man has two houses, one which has a house-of-office that is kept in by the wall of the same house, from a cellar in another, and he sells the house to which the house-of-office does belong, the buyer is to keep it in good repair, so as not to prejudice the vendor's house, for he is not to use it so as to hurt another.

Suppose

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Suppose one sells a piece of pasture, lying open to another piece of pasture, which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece of ground; so of dung, or any thing else.

If a man erects a house-of-office, to which there is contiguous a vacant piece of ground which is his, by which the house-of-office is kept in, there, if he sells the vacant ground, and the vendee digs a cellar in it, as he may do, there he must defend his cellar against the house-of-office.

If a man builds next to a vacant piece of ground of his own, and then sells the new house, keeping the ground in his own hands, he cannot build upon the waste ground so as to stop the lights of the house; for by sale of the house, all the lights, and all necessaries to make them useful pass; for by sale of the house, all the convenience it has will pass; and as he himself cannot build to the prejudice of the house so sold, so cannot the vendee of the vacant ground do it; but if in that case he had sold the vacant ground, without reserving the benefit of the lights; the court doubted in that case, whether the vendee might build so as to stop the lights of the vendor, because he parted with the ground without reserving the benefit of the lights; for that case differs from that of *Palmer and Fletcher*; and they said, they doubted of the case in *Keilw.* 98. where it is held, that the owner of the lower rooms in a house is bound to repair the foundation; there is indeed a writ in *Nat. Brevium* 127. to a mayor, to command him that has the lower rooms, to repair the foundation; and him that has the garret to repair the roof; but that is grounded upon a custom, and the declaration would be better to say only, that the wall, and the house-of-office are the defendant's, and that through the default of him the filth ran into your cellar. *Tenant v. Golding*, 6 *Mod.* 313.

P *421.

6. In an action upon the case, the plaintiff declared that he is seized in fee of a messuage, and that he and all those whose estate he hath have had a seat in the church; this was held good, though he does not prescribe time out of mind to the seat, and especially the action being brought against a wrong-doer. 2 *Lev.* 193. *Merchant v. Whitepane*.

7. So where one declares upon a possession, it was held well enough against one that disturbed the plaintiff of his right of burying in the aisle of a church. 3 *Lev.* 73. *Ashly v. Freckleton*.

8. In an action upon the case for disturbing the plaintiff of his common; there was judgment by default, and a writ of error brought, and the error assigned was, for that the plaintiff had not laid any title, either by grant or prescription. It was ruled, that in an action upon the case, the plaintiff need not shew a title. *Skinner* 214. *Mich.* 36. *Car.* 2. *Bold and Broking, Jones Car.* 2. 148. 1 *Vent.* 165.

9. Where

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9. Where it was thought necessary for the plaintiff to shew how the particular estate was created before he could well maintain his action for disturbance of common. *Cro. Eliz.* 154. *Honeywood v. Husbands.*

10. Where it was held a good prescription for the plaintiff to prescribe in the tenant for life, and him in remainder, inasmuch as they make but one estate. *Ibid.*

11. Where an action was brought by a copyholder against the lord for disturbing him in his common, and the prescription, was that time out of mind there was a usage within that manor, that every copyholder within the manor should have common in such a waste, and the defendant being the lord, dug holes and burrows for conies, and so had disturbed him of his common; this was held a good prescription, and the court took this difference; where a copyholder prescribes against a stranger, there he ought to alledge the prescription in the lord for him, and his tenants; but where he prescribes against the lord himself, there he ought to alledge it by way of usage. *Cro. Eliz.* 390. *Pearce v. Bacon.*

12. In an action upon the case for not grinding at the plaintiff's mill; and the plaintiff alleges that he has, and ought to have toll, and that the inhabitants ought to grind at his mill; that is good without making a title to the toll, or alledging a prescription or custom for the inhabitants. 2 *Vent.* 292. or that he ought to repair the mill, and find grinders, or that he held the mill. *Stile* 421.

13. In an action upon the case for stopping up lights, to say that the plaintiff was possessed for divers years, without saying how many was held good. *Ventr.* 248.

14. Where it was held sufficient to say, that the tenants and occupiers of such lands have time out of mind used to repair such a fence, without shewing what estate they had. 1 *Ven.* 264. *Anonymous.*

P *422. *15. Where it was sufficient to declare upon the possession only. 3 *Keb.* 820. *Saunders v. Williams*, 1 *Ven.* 319.

16. In an action upon the case for stopping of a way, the plaintiff declared that he was possessed, as an inhabitant, of and in a certain ancient messuage, on the 29th of September, in the first year of the now king and queen, and so continued to the first day of January then next following, and for all that time had a foot-way over the defendant's ground, *tantum ad messuag' præd' spectan' & pertinen'* & *de jure habere debet*, and the defendant stopped it up, *ad damnum, &c.*

The defendant pleaded a frivolous plea; to which there was a demurrer; it was objected on the defendant's part, that the declaration was insufficient, because the plaintiff did not prescribe for the way, nor otherwise entitle himself to it than by a possession of the messuage, and that he had, and ought to have a way to the said messuage belonging, &c. and a difference was taken between this and

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and *Dent and Oliver's Case*, 2 *Cro.* 43. where one alledged himself to be seized in fee of a manor, and had a fair there, and that the defendant disturbed him taking toll. And in 2 *Cro. Stackman and West*, there is a prescription laid in the dean and chapter, who has the fee for the way; but it was objected, that a corporation could not prescribe in a *que estate*; but it was held well, being but inducement to the action.

And the court here held the declaration sufficient, it being but a possessory action; but a case was said to be so adjudged in this court between the same parties, *anno primo Jacobi secundi*. *Vid.* the case of *St. John and Moody*, upon the like point. 2 *Vent.* 186, 187.

17. The plaintiff declared, that he was possessed of a tenement, and a piece of land, to which he ought to have *common* for beasts *levant and couchant* upon his tenement in, &c. and that the defendant had entered and made holes in several acres, and stored them with conies, so that the plaintiff could not enjoy his *common*, &c. The defendant *demurred* to the declaration, and judgment was given for the plaintiff in the common pleas; and a writ of error was brought, and the error assigned was, that the plaintiff had not entitled himself to this *common* but only said *possessionat' & habere debuit*; but the action was adjudged to be well brought, it not appearing that the defendant was in possession, but only a *tortfeasor*. *Skinner* 621. *Stroud v. Birt*.

18. An action of the case was brought for diverting a water-course, in which the plaintiff declared, that he was seized of a water-mill, to him and his heirs, *secundum cons. decanatus de Wolverhampton*, and so prescribed for a watercourse, &c. and that the defendant intending to deprive him of the said mill, did divert the water *ab antiquo cursu suo, per quod* he could not grind so fast; there was a verdict for the plaintiff.

It was moved in arrest of judgment, for that a copyholder cannot prescribe in a *que estate*, and the court could not take any notice of any other estate the plaintiff had by this declaration, he should have left out *secundum cons. decanatus*; for how can he be so seized, without shewing what that custom was?

He doth not say that he diverted the water from the mill, but from its ancient course, *per quod*, &c.

The nature of his damages is laid insensibly, for the *gist* of the action is, that he had a mill, out of which he had profit by grinding. Now the word *molare* is insensible, and there is a proper word for grinding.

The first object was over-ruled by the court; for if the plaintiff was seized of an estate in *burrough English*, that had been a customary estate, because he hath it by the custom of the manor, and in such case he may prescribe. 5 *Mod. Rep.* 206. *Richards v. Hill*.

This

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P *423. *This action lies for making a dam, so does it for abating a dam which guides the stream. 1 *Show.* 250.

If it be for diverting a watercourse, the antiquity of the mill must be set forth in the declaration. 3 *Mod.* 49.

19. If a man hath common in a waste as appurtenant to his messuage, and 100 acres of land for 100 sheep, and *B.* hath other common there appurtenant to his messuage, and 100 acres of land for 100 other sheep in fee, and *A.* purchaseth of *B.* &c. and afterwards *A.* is disturbed of both commons, *A.* in that case cannot prescribe to have both the commons for the messuages, and 200 acres of land, but he must make two prescriptions to the two several messuages and lands. *Bent.* 74.

20. The plaintiff brought an action upon the case against the defendant, setting forth, that he had a right of common in *A.* and that the defendant put in his cattle, &c. *Ita quod communiam in tam amplo modo habere non potuit.*

The defendant pleads a license from the lord to put in *averia sua*, which was agreed to comprehend hogs in the most general sense; upon a *demurrer* the court gave judgment for the plaintiff, because the defendant in his plea had not alledged that there was sufficient common left for the commoners; for the lord cannot let out a pasture so as not to have sufficient common for the commoners; and though it was objected that the plaintiff might have replied specially, and shewn there was not enough, yet it was agreed by the court, that in this case he need not; because his declaration to that purpose was well enough, and that being the very *gist* of the action, the defendant should have pleaded it.

It was held indeed, that in an action upon the case by the commoner against the lord, he must particularly shew the surcharge; but if the action be brought against a stranger, this will be sufficient. 2 *Mod.* 6. *Smith v. Ferwell.*

21. In an action upon the case where the declaration was, that the plaintiff *quamdiu & adhuc* was seized of a messuage to which he had common, and the defendant made coney-burrows; but it does not appear that it was at the time he was seized, and therefore naught. *Ben.* 137.

22. In an action for stopping a way to such a field, it is good without shewing what interest he had in the field; but for stopping a way to a close it is otherwise. *Lat.* 160.

23. In an action of trespass upon the case for stopping a way upon a prescription in *A.* for his tenants and occupiers, and the plaintiff does not say he is an occupier, it is not good. *Stile* 302.

24. How a *prescription* may be made for a way, see *Stile Rep.* 300, 301, 371.

25. If I have, and time out of mind had a private way to my house, ground, common, or other place, by custom, prescription, seoffment

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feoffment or otherwise, and another man stops or hinders it in all, or part, I must have this action.

26. Where a *prescription* to do that which is in its nature a *nusance*, was held a bad *prescription*. 2 Cro. 446. *Fowler v. Sanders*.

27. An action was brought by *A. B.* against *C. D.* setting forth, that the said *C.* was seized in fee of the land over which there was a way, and likewise of other lands, and did by indenture bargain and sell to *J. S.* the land in fee, with a way over his land, and that *J. S.* let to the plaintiff the land for years; the most material objection taken to this declaration was by *Yelverton*, that there is not any grant of the way in the indenture, but only a bargain and sale of land, and of a way out of his other land, which cannot be good for nothing but the use passed by the deed; and there cannot be a use of a thing which is not in *esse*, as a way, common, &c. which are newly created, and until they be created *no use can be raised by bargain and sale, and by consequence nothing passed by this indenture; and of that opinion was all the court, that for this cause the plaintiff had not shewn any sufficient title. P *414.

But as to two more objections taken; 1. That the plaintiff does not shew the deed of the lease, and without a deed the way passeth not. And 2. That the lease is pleaded of the land, without any express mention of the way; the court held the declaration good; for when land is granted with a way thereto, it is *quasi* appendant unto it, and a thing of necessity; wherefore by the lease of the land, although the way be not mentioned, it well passeth without its being expressed in the deed; and therefore the difference will be betwixt a grant of land with common and estovers to be burnt there, if he lets the land, the common and estovers will not pass without a deed, and express words therein; because they be profits appender in another's soil, and are not of necessity; but the land cannot be used without a way; wherefore it shall ensue it, and pass of necessity, and unity of possession does not extinguish it. 2 Cro. 189, 190. *Beaudeley v. Brook*.

28. In an action on the case for a *nusance* in stopping of a way; the plaintiff by his declaration entitled himself to the way by a custom, whereas he ought to have claimed it by prescription; and for that cause the court held the declaration to be naught. *W. Jones* 376. *Baker v. Bearman*.

29. In an action on the case for stopping a way; it was moved in arrest of judgment, that it did not appear in the declaration to what village the common way led to; and *per cur.* it is a good exception; but if it had been unto a common way there, or in such a village, it had been good. 1 Brownl. 6. *Allyns v. Sparks*.

30. The plaintiff declared for a way in *Et trans peciam pasturæ*; and after a verdict judgment was staid, because *pecia pasturæ* is uncertain. *Lutw.* 124. *Jones v. Hamond*.

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31. If it be laid to be *usque ad communiam*, it is good, because it shall be intended a common field; but if it is *usque ad clausum* it is ill, unless the plaintiff also shews in his declaration what interest he had in the close. *Latch* 169. *Parker v. Newsham*, see *Noy* 86.

32. An action upon the case was brought for laying in the highway in *Coggeshall*, leading from *Coggeshall* to *Brayntree*, divers loads of logs, whereby the defendant much straitened the highway, so as upon the evening of such a day, riding on the same way, the plaintiff's horse stumbled upon these blocks and much hurt him, by which, &c. the defendant confesses it to be an highway; but he saith, that the town of *Coggeshall* is an antient vill, wherein all the inhabitants there having antient houses, used time out of mind to lay logs in waste places of the said way before their doors for their fuel, leaving sufficient passage for chariots, horsemen and footmen; and that he was seized in fee of an antient house, and laid logs for his fuel in waste places of the highway, leaving sufficient for passage of chariots, horsemen and footmen, &c. And the plaintiff riding by the way *improvidē*, turned his horse upon the blocks, and fell, &c. Whereupon the plaintiff *demurred*, and without much argument it was adjudged, first, that the action will lie for the plaintiff, because of his having a special damage, and cause to bring that action, although it be a public nuisance. 27 H. 8. 27. Co. 5. 73. *Williams's Case*. Secondly, that the prescription to make a nuisance is not good, for it is against the law to prescribe in such manner. Thirdly, This prescription for the inhabitants is not goods; wherefore it was adjudged for the plaintiff. 2 Cro. 446. *Fowler v. Sanders*, 180. *Noy* 120. *Stone v. Wakeman*.

P *425. *33. An action upon the case was brought suggesting, that whereas there had been a way within the city of *Canterbury*, leading from *St. Peter-street*, unto a street called *Rushmarket*; and that the inhabitants of the city had used time whereof, &c. to pass that way, and that the plaintiff was an inhabitant there, that the defendant had made a ditch, and erected a pale cross that way, whereby the plaintiff had lost his passage, &c. The defendant pleaded not guilty, and by a *visne* awarded of *W.* in the county of *Kent*, by assent of the parties, in regard the cause concerned all the inhabitants of *Canterbury*, it was found for the plaintiff; and it was moved in arrest of judgment, that it was a mis-trial; first because it ought not to have been by a *visne* of *Canterbury*. *Vide* 21 Ed. 4. 31. *Dyer* 299. But the court held it to be well enough because it was by assent of the parties, which is entered upon record. *Ei consensus tollit errorem*; *vide* 44 Ed. 3. 6. 44 Aff. 4. *Dyer* 397. And *Fenner* cited the lord *Cromwell's* case to be adjudged, that an issue tried by another jury than it ought to be; yet it being by assent was well enough. Secondly, It was moved by *Coke*, attorney-general, that this action lies not for a private person, because it is a common nuisance, and is punishable in the court-leet only, unless he can shew

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shew some prejudice; as 27 H. 8. 27. is, and so it was adjudged in this court between serjeant *Benlow* and *Kemp*, that he might maintain an action upon some special prejudice; and at *St. Alban's* term, between *Williams* and *Johns*, where a chapel was within a manor, and the parson of the adjoining church used to read divine service every Sunday, for the lord and his tenants in the said chapel; and for that the parson had failed therein, the lord brought an *Action upon the Case*; it was adjudged that it lay not; for so every one of the tenants might bring the like action, which would be inconvenient that he should be liable to all their actions, but he ought to be punished by the ordinary in this case; but peradventure where there is not any other remedy to be had than by action, there every one may have his action who is grieved. And therefore it was adjudged between *Westbury* and *Powell*, where the inhabitants of *Southwark* had a common watering-place, and the defendant had stopped it, it was adjudged that an *Action on the Case* lay, but it is here punishable in the leet; wherefore, &c. and of that opinion were *Popham*, *Gawdy* and *Fenner*; that without a special grievance shewn by the plaintiff, the action lies not; but *Clinch e contra*; for the stopping of itself is a special prejudice to the plaintiff, that he cannot go that way; wherefore it is reason he should maintain the action; but it is adjourned. *Co. Lit. fol. 56. 1 Cro. 664. Fineux v. Hovenden.*

34. In a declaration for a *nusance* in stopping up a way, though the way be appurtenant to a house, the plaintiff in his declaration shall never alledge a way to be appendant or appurtenant to a house, because it is only an easement, but no interest; and so it was adjudged on a special verdict. *Yelv. 159. Godfrey v. Frith.*

35. In an action upon the case the plaintiff declares, that whereas the plaintiff being seized of an house in *D.* in the county of *L.* and shews the estate, &c. and prescribes to have a cross-way, in, by and through a certain way in *Sal.* in the county aforesaid, into such a close in *D.* in the said county; and that the defendant made a hedge in the close of *D.* in the said county, and stopped up his cross-way, *per quod actio accrevit*; and upon not guilty pleaded, it was found for the plaintiff; and upon a motion in arrest of judgment these following exceptions were taken.

First, Because to prescribe to have a cross path in a certain way, it shall be intended a common cross-way, and that being of common right the prescription is gone; but the court held the contrary.

For though a man cannot prescribe in a common cross-way, yet to have a way in, *by and through that common cross-way it is P *426. otherwise, for that is across, athwart, and through the cross-way; and then notwithstanding that it is in the highway, he may continue his course without a prescription, it may be that the cross-way is enclosed and hedged on both sides; and therefore to prescribe to pass cross there, and repass through, is a good prescription.

Secondly,

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Secondly, The crossing and going through the cross-way, is only shewing the continuance of the cross-way unto such a close, to which the plaintiff claims a way; therefore the declaration is not good, because the village, nor county, where *B. acre* lies, and to which the way should lead, is alledged; but the court held on the contrary, because the village and the county is alledged where the *nusance* is done; for that only is the cause of the declaration, to which he hath pleaded not guilty; and upon that the issue is joined, and thence the *visne* shall come; but if the issue had been joined upon the prescription of the cross-way, or the right of that, the *visne* shall come from both villages, *viz.* where the house is, and out of the village where the cross-way leads, and then the plea had been ill; for the incertainty of the village or county where *B. acre* lies. *Noy 9. Paul Banning's Case.*

36. An action upon the case was brought, supposing that the governor, and the poor of the hospital of the holy *Trinity* in *Greenwich*, of the foundation of *Henry* earl of *Northumberland*, were seized of an house in the parish of *St. Martin in the Fields*; and that he, and all those, whose estate in the said house, &c. have had a foot-way from the said house, unto the river of the *Thames* in the same parish, and let the said house to the plaintiff for years; that the defendant erected a gate cross the said way in the said parish, &c. Upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that the declaration was not good, because it is shewn, that the corporation, and all those whose estate, &c. have had, &c. whereas a corporation cannot prescribe but in him and his predecessors; also one cannot shew a *que estate*, without shewing how by deed, for they cannot have it without deed; and of that opinion was *Doderidge* chief justice, but the other three justice were against him, because the action is brought by the lessee for years, who hath not the deed, and it is but a conveyance to the action, which is grounded upon the disturbance done unto him as to his possession. But if he had claimed rent, or common in gross, which cannot pass without a deed, it had been otherwise; for there he could not shew a *que estate*, without shewing a deed how he came by the estate; wherefore it was adjudged for the plaintiff. *2 Cro. 673. Slackman v. West.*

37. *Cantrel* brought an action upon the case against *Stephenson*, for stopping his way in a meadow called *Madbrook*, in the parish of *Rotherhithe* in *Kent*; upon not guilty pleaded, and a verdict found for the plaintiff, it was moved in arrest of judgment, that the plaintiff, as lessee to the haberdashers company of *London*, claimed to have a way for them; whereas they having let the land cannot have the way, but the lessee in possession. 2dly, The prescription is not rightly applied, for it ought to be for them to have a way *pro tenentibus & occupatoribus suis*, which is not so here. *Twifden* answered, it shall be intended tenants and occupiers to the haberdashers,

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dashers, though it be not said *suis*. *Latch* said, that a prescription *per que estate*, is good in an action upon the case, because no land is claimed. And *Green* on the other side said, the exception taken was helped by the verdict. *Wild* on the other side said, that it doth not appear, that the tenant who brings the action, comes in by the haberdashers who claim the way, and **B** he cannot prescribe to have it, and the prescription ought to be laid *pro tenentibus & sub-tenentibus*; * which *Rolle* Chief Justice denied and said, that it is **P** * 427. said, that the haberdashers were seised in fee, *& postea hucusque*, and so they have the fee at the time, and may prescribe; but it had been better for the party to have shewed that he was their tenant; but it being after a verdict, the question is, whether it be not helped; upon reading the record, *Rolle* Chief Justice observed, that it appeared not whose occupier and tenant the plaintiff is, but only by way of argument, but said, the question is, whether the verdict does help it, and he inclined it did not, because the action is brought by the tenant, who hath not intitled himself to the action; for he hath made only a title to the way in the haberdashers, but hath derived no estate from them to himself. At another day, *Rolle* Chief Justice said, we must not take things by intendment, and here is a failure in the very *gist* of the action, for he hath no action, as for aught appears he hath no interest; for it appears not how he is occupier of the land, for he doth not say he is *occupator suus*; and as he hath laid the declaration, the company ought to have brought the action. *Fermain* Justice said to the same purpose; and said, that upon a *demurrer* it had been clearly naught, and the verdict here doth not help it; for no title appears for the plaintiff, for the verdict cannot give what he had not before. *Nicholas* and *Ask* justices said to the same effect. *Rolle*: If it had been *occupator suus*, I doubt it would not make the declaration good, because it shews not by what title; so the rule was, *nil capiat per billam nisi*. *Stile* 300. *Cantrell v. Stephens*.

38. An action upon the case was brought, suggesting, that whereas the plaintiff, upon the ninth day of *October*, 5 *Car.* was possessed of an antient house in *Worcester*; and the defendant the 9th of *October*, 5 *Car.* was, and is yet possessed of another house, and a vacant piece of land adjoining to the north part of the plaintiff's house, wherein were three windows, time whereof memory, *&c.* by which windows the light came out of the said vacant piece of land, into the plaintiff's house, time whereof, *&c.* that the said defendant maliciously to deprive him of the light coming to the said windows into his house, on the said 9th of *October*, 5 *Car.* erected a building on part of the said vacant piece of ground, and thereby stopped the light coming by the said windows into his house; whereby his house is totally darkened, and he much prejudiced thereby. The defendant pleaded not guilty, and it was found against him; and an exception was taken in arrest of judgment, that the declaration is repugnant

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pugnant in itself, for to say *adhuc possessionatus* of the said vacant piece of land, and to shew the offence in erecting a building upon it, shews that it is now a vacant piece of land; and of this opinion was *Berkley*; but *Richardson, Jones* and *Crooke*, held, that this is good enough, and no repugnancy in the *adhuc possessionatus*; for it may be, that part of the said vacant parcel of land is built upon and darkens his light, and part remains still vacant, and the declaration as to that is but surplusage, and the one part will stand with other. Another exception was taken, because he alledgeth not any person in whom the prescription may be fixed, and the plaintiff is but lessee for years, who cannot prescribe; but the exception was disallowed; for it was answered thereto, that to say the time whereof, &c. there need not be any prescription in any person; wherefore it was adjudged for the plaintiff. 3 Cro. 325, *Symonds v. Seabourne*, S. C. *W. Jones* 326.

39. In an action upon the case for stopping of lights, the plaintiff declares, that he was possessed for many years, without saying how many, and that time out of mind the light came in at the windows, and it was said to be a good form of a prescription. 1 Ven. 248.

P *428. 40. In an action upon the case for building a house, by which the plaintiff's lights were stopped; where the plaintiff says in his declaration, that the light *de jure debet & inferri consuevit* into his house; after a verdict it was held sufficient, for that it must so have appeared upon the trial, but that it would have been otherwise upon a demurrer. *Carthew* 454. the case of *Roswell* and *Pryor*, Trin. 10 W. 3.

41. In an action upon the case for a nuisance erected, it was resolved *per totam Curiam*, where a nuisance is made to the land of two tenants in common, that they shall join in an action, for it is personal, and concerns the profits; and as they shall join in trespass, so they shall join this action, but in forging of a false deed, they shall sever; for that concerns the inheritance of the land. It was also held for a nuisance, erected in the name of a devisor, and continued afterwards, as this case was, the devisee shall join in the action, for the continuance thereof is as the new erecting of such a nuisance. 2 Cro. 241. *Some v. Barwick*.

42. Several freeholders cannot join in a prescription to claim an intire interest in another's soil, nor can freeholders and copyholders join. 1 Ven. 390.

43. An action was brought for keeping a mad bull, but the judgment was arrested for not alledging in the declaration, that the plaintiff knew the bull to be mad. 1 Lut. 90. *Bayntine v. Sharpe*.

44. An action was brought, setting forth in the declaration, that the defendant kept a dog accustomed to bite sheep, and *scienter retinuit*, without *sciens* that the dog was accustomed to bite sheep, and held good. 2 Syd. 127.

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45. An action upon the case was brought for negligently keeping his fire, by reason whereof the plaintiff's house was burned, *viz.* *In parietibus in partitionibus fenestris in operibus ferrariis & ornamentis ejusdem domus*; and upon demurrer this exception was taken to the declaration; That it was too general and incertain, for damages could not be taken for the walls and ornaments of the house.

As where a trespass was brought for taking *diversa genera apparatusum*, or trover for goods, *cum aliis implementis & necessariis*, not shewing what they are; this was held ill after a verdict, for the court cannot give judgment for such uncertain parcels.

E contra; It was argued for the plaintiff, that the action, had been well brought without the *videlicet*; for the enumerating the particulars was but matter of aggravation and inference; and this being an action wherein damages are to be recovered, they may be divided, and the plaintiff ought to recover, for that which is well laid in the declaration, and that is for negligently keeping his fire, and the plaintiff had his judgment. 5 *Mod. Rep.* 181. *Littleton v. Cole.*

46. In an action upon the case, for disturbing the plaintiff in the enjoyment of a church seat, which he prescribes for himself and family, without saying that he used, or ought to repair it, or some other consideration; after a verdict for the plaintiff, the declaration was held good; for without reparation he cannot prescribe; therefore it shall be intended to be given in evidence; but upon a demurrer it would have been naught. *Ray. 52. Bateman v. Buxton,* 1 *Syd.* 203.

47 The plaintiff declared for lending a horse to ride from such a place to such a place, and that the defendant abused him *in itinere*, without alledging a place for the *Venue*; *Q.* if good. *Ray.* 187.

48. In an action upon the case for not grinding at the plaintiff's mill; he ought to shew that his mill is sufficient to grind all the corn, &c. cited in *Ray.* 327.

49. In a declaration for disturbance of an office, the plaintiff ought to lay his declaration, that the defendant disturbed him *Vi & Armis.* 9 *Co.* 50. *b.* But in a declaration for non-feazance, it ought not to be so laid, because that is *oppositum in objecto.* 9 *Co.* 50. *b.*

*50. Though a declaration in an action upon the case begins, that the plaintiff complains in an action of trespass for that, &c. yet that may be a declaration in case, though the *exordium* of the declaration be in an action of trespass. *Cro. Car.* 325. P *429.

51. In an action upon the case for falsely affirming the goods to be his own, when they were the proper goods of another; without saying *sciens* that they were the goods of another; was held to be well enough after a verdict. *Carthew* 90. the case of *Crofs v. Gardner,* 2 *Cro.* 196, 387, 469, 470. *Yelv.* 20, 40. 2 *Cro.* 174. 1 *Roll's Abr.* 91. *Syd.* 146. 1 *Lev.* 102.

52. In

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52. In an action upon the case for keeping the passage stoppt, so that the plaintiff could not come to cleanse his gutter ; it is necessary to alledge a request to open his passage, but after a verdict, the not alledging it shall be supplied. *Mod. Rep.* 27.

53. An action upon the case was brought for refusing to admit an attorney into court ; that was held by prescription, and alledged he was elected by the mayor, who had the election for 200 years and more ; and the declaration was held good. *Jones, Car.* 2. 145.

54. In an action upon the case against a taylor for spoiling a coat, without shewing what materials were delivered to him, or how the coat was spoiled ; and the declaration was held naught for both reasons. *Vent.* 268.

55. An action upon the case was brought upon a custom for liberty of foldage for all sheep feeding in common fields ; and alledged, that the defendant *non faldavit sicut debuit*, nor permitted the defendant to have foldage ; after a verdict the declaration was held bad. 2 *Ven.* 138.

56. Where a declaration in an action for erecting a nuisance, need not mention the plaintiff's house to be an antient house. 3 *Keb.* 133. *Cox v. Mathews*, the like point in *Mathews v. Bowtel.* 3 *Keb.* 218.

Other Cases where the Declaration hath been held good in this Action relating to

W. Jones 326. *Netters v. Seabourne.* Stopping of lights.

2 *Show.* 507. *Glynne v. Nichols.* Diverting a water-course.

2 *Ven.* 292. *Chapman v. Flexman.* For not grinding at the plaintiff's mill.

2 *Ven.* 78. *Chamberlain v. Cooke.* An action against a common carrier for losing goods, &c.

2 *Ven.* 186. *Warren v. Saint hill.* For disturbance in a way.

2 *Cro.* 43. *Dent v. Oliver.* For disturbance in taking toll, without shewing by grant, title or prescription to the fair.

2 *Cro.* 604. *Darwney v. Dee.* } To a disturbance of a seat in

2 *Syd.* 203. *Stephens v. ———* } the church.

2 *Cro.* 255. *Ash v. Brudnell.* In an action for tearing the seal of a deed.

2 *Cro.* 263. *Wrey v. Vesper.* } To diverting a water-course.

Stile 371. *Harris v. Tooker.* }

Stile 421. *Kemp v. Gard.* For not grinding at the plaintiff's mill.

Stile 19. *Long v. Bennet.* For not suffering the plaintiff to take away *unam acram Ligni* bought by the plaintiff of the defendant.

Stile 50. *Lodge v. Weeden, All.* 22. *S. C.* In an action for killing several infected cattle, and throwing them upon the plaintiff's land.

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Stile 303. *Wood v. Topham*. In an action *quare filiam & Har-
redem rapuit*.

Stile 342. *Gough v. Cann*. In an action brought for a rescue.

1 *Keb.* 825. *Prior v. Tuffs*. For negligently keeping fire.

4 *Mod.* 9, 10, 11. *Cudlip v. Randall*. For the like.

1 *Lutt.* 116. *Reynolds v. Herrett*. An action for dilapidations.

*2 *Saund.* 400. *Smith v. Martin*. For doing damage to the wall P *430.
of the plaintiff's garden, by digging too near the foundation.

2 *Syd.* 34. *Clovelly v. Cardinall*. For not administering the sacra-
ment, but refusing it to the plaintiff.

2 *Keb.* 308. *Wimberley v. Tampling*. For rescuing a distress for
rent

2 *Keb.* 114. *Gibs v. Osbaston*. For toll for a light-house for
ships.

2 *Keb.* 221. *Bray v. Holtby*. For not repairing a gutter.

2 *Keb.* *Loanes v. Richardson*. For building a wall which hin-
dered the plaintiff's prospect.

1 *Keb.* 260. *Weston v. Hortall*. Where a prescription for occu-
piers to repair was held ill.

1 *Keb.* 599. *Lightfoot v. Salt*. For erecting a nuisance in mak-
ing a swine-sty.

1 *Keb.* 584. *Smith v. Trimnell*. For continuance of a wall
which stopped the plaintiff's lights.

Allen 84. *Cooper v. Sir John*. For throwing down hedges, and
the cattle on an adjacent common came into the plaintiff's fields.

1 *Cro.* 153. *Honeywood v. Husbands*. A prescription for a title
for common not well set forth.

Gouldsb. 132. *Pearce v. Barker*. How a copyholder must prescribe.

Claydon v. Horsey. The same point.

343. *Gouldsbrough v. Sheene*. Where the declaration was
held good in an action brought by a commoner, and several excep-
tions taken.

348. *Lee v. Griffel*. The declaration not alledging how he
lost his common, and therefore ill.

Hutton 71. *Bickner v. Wright*. The like point.

2 *Lev.* 246. *Stables v. Mellon*. Where a prescription by a cor-
poration was adjudged good.

Modern Cases 19. *Crowder v. Oldfield*. A prescription by a
copyholder for common, where ill.

2 *Lev.* 148. *Sir John v. Moody*. An action for a disturbance of a
way to a wood of which the plaintiff was seised in fee, without any
prescription as to the way.

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Other Instances where Declarations have been held ill relating to the following Particulars.

2 Roll's Rep. 346. *Lee v. Griffell*. For erecting coney-burrows.

1 Ven. 167. *Coriton & al v. Lithby*. For not grinding at the plaintiff's mill.

2 Ven. 138. *Dickman v. Allen*. For not folding sheep upon the plaintiff's waste.

2 Cro. 158. *Blihe v. Topham*. For digging a pit in a common, whereby the plaintiff lost his mare.

2 Cro. 505. *Bennus v. Guildley*. For suing the plaintiff to execution after a release.

Stile 306. Cantrell v. Stephens. For disturbance of a way.

Stile 162 ———v. *Phillips*. To an action for an escape.

Stile 289. Chapman v. Brook. } In an action for disturbance of

1 *Keb.* 390. *Eick v. Edwards*. § the plaintiff's common.

2 Keb. 250. *Greatrickes v. Brookhouse.*

2 Keb. 838. Miller v. Clerke.

2 Mod. 274. *Biret v. Wilson.*

1 *Mod.* 6. Corporation of *Darby*. A prescription by the corporation of *Darby*, for cattle without November.

3 Lev. 266. *Winford v. Woolaston*. For disturbance of a way, which the plaintiff had a right to, without laying a prescription.

P *431. *1 *Lutt. Blockley v. Slater.* } Where a declaration for the distur-
Jones v. Hamond. } bance of a way was held ill.

Palmer 161. Snelgrave v. Erograve. Where two br

action for a disturbance of their seat in the church.

1 Cro. 112. *Jackson v. Mordant.* } See divers exceptions to the
 Broome v. Mordant. } declarations in these two cases
 } for diverting a water-course
 } from a mill.

1 Cro. 19. *Westbourne v. Mordant*. Several exceptions to a declaration, for causing water to overflow the plaintiff's meadow.

1 Cro. 751. *Leeds v. Shakerby*. See another exception to the declaration for diverting a water-course.

2 Lev. 156. *Terry v. Stredwick*. In an action upon the case for obstructing a water-course.

Where a declaration was held ill in an action for erecting a nuisance in a river. *Hob. 193. Biccott v. Ward.*

What shall be intended in a declaration for a nuisance in obstructing the light after a verdict. 1 *Keb.* 584. *Smith v. Trimmell.*

Where it need not be alledged in the declaration for a nuisance that the house is an antient house. 1 *Keb. 589. Lightfoot v. Salt.*

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Where the special damage was sufficiently alledged in a declaration for a nuisance of a public nature. 1 *Keb.* 847.

Where a declaration was held sufficient after a verdict in an action for not repairing a gutter. 2 *Keb.* 221. *Bray v. Holthy.*

Where the court inclined the declaration to be insufficient, after a verdict, in an action for obstructing the light. *Loanes v. Richardson.* 2 *Keb.* 611.

Where the declaration was held sufficient in the same action after a verdict. *Roswell v. Prior, Carthew* 454.

57. An action against a carrier was brought for losing the goods without reciting the custom; *Q.* if good. 1 *Syd.* 245. 1 *Co.* 96, 168. 2 *Co.* 224.

58. Upon a sale of wine, the vendor affirmed it the best wine in *England*; in an action upon this affirmative it ought to be averred, that there was as good or better wine in *England.* *Noy* 48.

59. In an action on the case, the plaintiff declared on the common custom, that lightermen ought so to order their lighters, as not to damnify the goods they carried; that the defendant being a lighterman spoiled his goods by letting water come to them. It was objected, that the plaintiff had not shewed in his declaration, that the defendant was a common lighterman, and that it was not precisely shewn how they were spoiled; but the plaintiff had judgment. *Palm.* 528. *Symons v. Darknell.*

60. If a carrier takes goods to carry to *D.* and they in a common inn are stolen, the owner of the goods and not the carrier shall have an action for them. See *Dalison* 8. and *quare.*

61. Though in actions against carriers, generally it is laid to be by the custom of the realm; yet it is indeed the common law, and the declaration is good without setting forth the custom, though it is the more usual way; and according to some opinions the best to set forth the custom. *Hob.* 17. *Rich v. Kneeland.* 2 *Syd.* 245. *Mathews v. Hopkins.* 1 *Mod.* 227.

62. In an action against a common carrier, the plaintiff declared that he was possessed of divers goods, (*viz.* *Quatuor poculis argenteis, uno poculo argenteo, duabus seriebus Aurearum Tibularum, (Anglice, sets of gold buttons) una serie Cyanorum & Granatorum, (Anglice a set of turks and garnets)* and of divers other things in the declaration mentioned: and that he delivered them to the defendant to carry from *Bury St. Edmonds* to *London*, there to be safely delivered to the plaintiff; and that he paid the defendant three shillings for the carriage, and that the defendant afterwards through negligence lost them; the defendant pleaded not guilty, and after a verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was insufficient. *First*, He declares for four silver pots, and then afterwards of one silver pot, and doth not say *uno alio poculo*, and the same omission there is in divers other parts of the declaration.

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on; *sed non Allocatur*; for if for want of the word *alio* or *aliis*, the thing shall be taken to be the same, and a tautology; then the jury shall not be supposed to have given damages for the things so laid; and if in construction they are to be taken as divers pots, then damages are well given for them.

Secondly, And that which was most insisted on, was the incertainty of a set, and not said how many turkey stones, and how many garnets; as an action of trover, *pro ducentis ovibus matricibus & agnis*, has been held naught, for not setting forth how many ewes, and how many lambs.

But the court here held the declaration well enough; for a set is a sufficient certainty, being intended to be well known to those that deal in such things, and in what number such precious stones are placed in such sets. 2 Ven. 78. *Chamberlain v. Cook*.

63. *Mason* brought an action against *Grafton* for goods imbezilled out of his inn, and found for the plaintiff; in arrest it was excepted, that he had not alledged it to be *in communi Hospitio*, (*Quare* if both in the writ and declaration; yet because the declaration laid the custom for the common inns, and then laid that he was *hospitatus in hospitio*; the plaintiff had judgment, for it shall be intended, that it is *domus non hospitium*, if it be not *commune*. Hob. 245. *Mason v. Grafton*.

64. In an action against the sheriff, who had a *capias* to arrest *A.* it was alledged in the declaration, that the sheriff *potuisset arrestare, &c.* but refused, and falsely returned *non est inventus*; after a verdict, the declaration was held good, without averring how he might have arrested him, for that he was in his view, or the like, but it had been bad upon a demurrer. Jones, Car. 2. 40. *Fish v. Asten*.

65. Where a declaration in an action of escape against the sheriff was held good upon a writ of error. T. Jones 217. *Atkins v. Joy*.

What Declarations have been held Good, and what not, in Actions for an Escape,

2 Cro. 288. *Burton v. Eyre*.

561. *Pigot v. Rogers*.

5 Mod. 413. *Odes v. Clarke*.

1 Lutt. 110. *Stanton v. James*.

121. *Slipper v. Mason*.

2 Bulst. Barnes v. Cary, & al'

Palmer 425. *Dickson v. James*.

1 Cro. 5. *Sheriffs of Norwich v. Bradshaw*.

158. *Appleton v. Burr*.

1 Show. 162. *Ridings v. Edwin, & al'*,

Mod. Cases 72. *Michelson v. Cawsey*.

Stile 297. *Drinkwater v. Pack*.

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What Declarations have been held good, and what not, for disturbances of Offices.

Where a declaration was adjudged good, in an action for disturbance of the plaintiff as farmer of a fair in taking his toll. *Owen* 109. *Escot v. Lanceny*.

3 Cro. 16. *Cook v. Younger*. For disturbing the plaintiff in the exercise of his office of the official of an archdeaconry.

* 3 Cro. 279. *Young v. Steel*. For disturbing the plaintiff in the exercise of his office of register in *Rochester*. P *433.

2 Cro. 241. *Kent v. Elwis*. For rescuing the defendant taken in execution.

330. *Child v. Lenthall*. In an action for an escape of one in execution brought against the marshal.

Thirdly, Of the Pleadings.

1. An action upon the case was brought for stopping up three lights, and the defendant justified the stopping of two, *absque hoc*, that he stopped three; this plea is ill, because the inducement goes but to part, and yet the traverse to all three; and in an action upon the case, a man shall recover *pro tanto*; but here he is precluded from that advantage, but the defendant should plead not guilty to one, and justify for the two other. 1 Saund. 268. Yelv. 225.

2. In an action on the case, the plaintiff declared that he was seised of a messuage, and several lands in the parish of *Dale*, and that he and all whose estate he hath, have used to have right of common, for all cominonable cattle *Levant and Couchant* upon the premises, in a certain meadow there called *Darpmore Meadow*, and in a certain place called *Cannock Wood*. That the defendant *Premissorum non ignarus*, had inclosed the said places in which the plaintiff had right of common; and likewise put in his cattle, as horses, cows, hogs, geese, &c. so that he could not *in tam amplo & beneficiali modo* enjoy the same.

The defendant, as to the inclosure and putting in of his hogs and geese, pleaded not guilty; and as to the residue that the Lord *Paget* was seised of a messuage of 300 acres of land, 40 acres of meadow, and 100 acres of pasture, and likewise of *Darpmore Meadow* and *Cannock Wood*; and being so seised, did by deed of bargain and sale enrolled, in consideration of 2000l. convey the said messuage, 300 acres of land, 40 acres of meadow, and 100 acres of pasture to the defendant and his heirs; and by the same deed did grant unto him all ways, commons and emoluments whatsoever to the said messuage

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messuage and premises belonging, or therewithal used, occupied, or enjoyed, or taken as part, parcel or member thereof; *Virtute ejus* the defendant became seised of the premises; and that the same were leased and demised for years by the said Lord Paget, and all those whose estate he had, *a Tempore ejus contrarii Memoria Hominum non existit*; and that the tenants or occupiers thereof, *a Tempore ejus*, &c. used to have common in *Darpmore Meadow*, and *Cannock Wood*, for all commonable cattle *Levant* and *Couchant* upon the premises, and used to put in their cattle into the said places, in which, &c. *Virtute ejus* the defendant having right, did put in his said cattle into the said places to take common there, and averred that there was common sufficient, both for the plaintiff and himself. To this plea the plaintiff demurred.

The court were all of opinion, that though the plea did amount to the general issue, yet for that reason alone the plaintiff had no cause of demurrer; for the defendant may well disclose the matter of law in pleading, which is a much cheaper way, than to have a special verdict, and that this is on the same reason of giving colour in pleading; but if the matter, by which the defendant justifies, be all matter of fact, and proper for the trial of a jury, then the defendant ought to plead the general issue. See the judges arguments in this case, *2 Mod. Rep. 274. Birch v. Wilson.*

3. In an action on the case for a seat in a parish church by prescription as appendant to a house, without allegation of the repair; the defendant pleads a prescription in him and his ancestors, and traverses the prescription alledged by the plaintiff. *Per Cur.* The traverse is *impertinent, and the case rests only on the disturbance; and judgment was given after a verdict by the whole court for the plaintiff; and a difference was taken between a prohibition and an action; and the case between *Buxton* and *Baker* in *B. R.* was cited and agreed to have been adjudged upon this difference. *Bradbury v. Burch, Tho. Jones 3.*

4. Where an action was brought for stopping a water-course with a *continuando*, and the plaintiff himself had abated the nuisance, which the defendant had pleaded, and the plaintiff had confessed by his demurrer; the court were of an opinion that it was not a good plea, and took this difference between a *Quod permittat*, or an *Affise*, for a nuisance, and an action on the case for the same, for the end of a *Quod permittat*, or an *Affise*, was to abate the nuisance, but the end of an action on the case was to recover damages; therefore though the nuisance was removed, the plaintiff is intitled to his damages that accrued before; and it is usual in actions on this nature, to lay the *Continuando* for longer time than the plaintiff can prove, but he shall have damages for what he can prove; and so here he shall recover the damages which he sustained before the abatement; and thereupon judgment was given for the plaintiff. *2 Mod. Rep. 253. Kendrick v. Bartland.*

In an action upon the case for diverting a water-course, where the plaintiff prescribes for a water running in a place called *7.* through

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through two closes called *Blackacre* and *Whiteacre*, to the plaintiff's messuage, and that the defendant, in order to hinder the water from running there, dug a ditch, by which, &c.

The defendant pleads, and after saying by way of protestation, that in summer time the water could not run to the plaintiff's messuage called *B.* and *W.* and that they are half a mile distant from the plaintiff's messuage called *B.* and that the defendant, and all those whose estate he hath, used to water their cattle in the said closes; and that for the convenientcy of watering their cattle, they did (as they had a right to do) dig a place to water their cattle, as often as there was a necessity for them so to do.

It was held that this was an ill plea, for the defendant had neither confessed and avoided, or traversed the matter in the declaration; and besides a prescription pleaded against a prescription is never good without a traverse. *Murgatroid and Law. Carthero 117. Pas. 2 W. & M.*

6. Where a plea of justification for a way was held ill. 1 *Lutt. 114. Langhton v. Ward.*

7. In an action for keeping a dog, *sciens eum ad mordendum oves consuetum*, the *sciens* is not to be traversed, though it is to be proved on the general issue, 4 *Co. 18.* for the *sciens* is not any direct allegation, or to be alledged in any place, therefore not traversable. 5 *Co. 77. Plow. 76.*

8. An action upon the case against one for digging so near the foundation of his house that it fell down, and he lost the profit of his house and land for 11 months; the defendant pleads in bar a recovery in an action against him, for digging under the foundation, *per quod* his house fell down, and he lost the whole profit of his house for 7 months; and averred the damages were given for the same, &c. and held a good plea. 3 *Lev. 180.*

9. The defendant granted the plaintiff leave to cut down ten trees; within three years after the grant, the plaintiff having cut some of them, the defendant in consideration he would forbear to cut the residue, until after the three years, *assumpsit super se*, that he would license him to cut down so many as would amount to ten after three years; and alledges in fact, that he had cut four, and the defendant disturbed him in cutting down the residue; the defendant pleads, that before the promise supposed, he had cut down the ten trees, *abque hoc*, that at the time of the promise he had cut down four *tantum*; the traverse was adjudged *good; for every matter in fact alledged by the plaintiff must be traversed or avoided, and therefore the cutting of the four trees is traversible; then the defendant may well traverse the allegation in the same words as it is alledged. (*Yelo. 195. 2 Saund. 206*) P * 435.

10. An action was brought for entering the shop, and taking away his goods by virtue of a commission of bankruptcy, by which he lost his trade and credit; the defendant pleads in bar a recovery in

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in a former trespass for entering his shop and taking his goods; it was held no good bar. *Stile* 3. 201.

11. If one justifies the abating a *misfance*, he need not shew he did it orderly, and with as little hurt as he could. *Salk.* 459.

12. Where it was held, that a rescue pleaded by the sheriff, to an action for an escape upon *mesne process*, was an ill plea. *Moor* 852. *May* v. the sheriffs of *London*; where the court would not permit the sheriffs of *London* to alter their plea pleaded specially, to a general plea of not guilty, in an action brought against them for a false return. *Stile* 417.

13. An action upon the case was brought against a serjeant at mace, for the escape of one in custody, by virtue of a *process* out of the court of the sheriffs of *London*, in an action of debt upon a bond sued there; and upon *non cul.* it appeared, that the bond was made out of the jurisdiction of the court; and thereupon it was objected, that the proceeding upon the bond was *coram non judice*; and all void; and the serjeant was a trespasser, and they cited 2 *Bull.* 64. 2 *Mod.* 30. 1 *Roll.* 545, 809. 1 *Sid.* 125. 1 *Lev.* 95. *Hob.* 267. *Lut.* 935, 1560. 2 *Mod.* 196. *March.* 117. *Stat. Westm.* 1. c. 35.

Et per Holt chief justice, to which *Powell*, and the rest agreed, where an inferior jurisdiction is confined to persons, as the marshal-*sea* was to those of the household, if it appears on the face of the declaration, that the persons that sue are qualified to sue, though in fact they are not; yet if the defendant does not plead to the jurisdiction, but comes in and admits it, he shall never take advantage of this afterwards, but is estopped and concluded; but if it is not averred in the declaration, that the person is qualified to sue, and within their jurisdiction all the proceedings are void, and *coram non judice*, and trespass lies against the officer.

Secondly, Where the inferior jurisdiction is confined to place, *viz.* to all contracts arising within a district, though the contract arises out of the district, yet the court may award *process*, and the officer may execute it, unless it appears to him that it arose *extra jurisdictionem*, as if this bond had been dated at *York*, and that was the case; 1 *Roll.* 809. but he is not bound to enquire either, whether there be a cause of action, or where it arose, and may proceed in his duty, unless the contrary appear to him; and *nota*; the plaint is general without any averment, *quod fuit infra jurisdictionem*, but that is supplied by the count; and if a matter arises *extra jurisdictionem*, and the plaintiff declares of it as *infra jurisdictionem*, the defendant may plead to the jurisdiction of the court; and if that be over-ruled, may have a prohibition on the Statute of *Westminster*. But if he waves that, and pleads to the merit, he can never then have a prohibition, nor can he take advantage of their want of jurisdiction; for by the averment of the count, and his own admission, he is estopped to say that it was a matter that arose out of their

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their jurisdiction; it is impossible the court should know where a transitory matter arises, unless the defendant acquaints them with it. *Judgment pro quer'*. Salk. 201. *Lucking v. Denning*.

14. Where a rescue pleaded by the sheriff to an action of escape upon *mesne process*, was held a good plea. 3 Lev. 46. *Gorges v. Gore*, 2 Lev. 144. v. *Mountague*, Noy 40. *Walde v. Lambert*, contra. 1 Cro. 868. S. C. with that in *Noy*.

*15. The statute of limitations is no plea by the sheriff to an action brought for money levied on a *fieri facias*. 2 Mod. 212. *Cochram v. Welby*, 1 Mod. 245. Cro. Car. 297. P * 436.

16. Where a plea by the sheriff, that the defendant in the original action appeared at the return of the writ, and the replication likewise, were said to be ill. 1 Lutt. 73. *Benson v. Musgrave*.

17. The statute of H. 6. for taking bail-bonds is a good plea to an action brought against him for an escape upon *mesne process*; though he returns *parat' habeo corpus*. *Baron v. Alderworth*. Cro. Eliz. 624.

What Pleas have been adjudged ill in this Particular Action, relating to the following Particulars.

To an action for destroying common, by pleading the grant of a free warren. *Timberley v. Grobham-How*, T. Jones 5.

A justification, by virtue of the custom of London, to an action for stopping up of lights. 1 Bul. 115. *Hughes v. Keymish*.

To a justification for toll. Cro. Eliz. 227. *Ward v. Knight*.

To laying wares in a warehouse of so great weight, as that the floor of the plaintiff was broken down. Cro. Eliz. 285. *Edwards's Case*.

To erecting coney-burrows. Cro. Eliz. 547. *Borwlston v. Hardy*.

A plea to an action for a disturbance of a seat in the church. 2 Cro. 604. *Darwney v. Dee*.

Pleading a recovery in a former action, to an action for digging on the plaintiff's foundation. 3 Lev. 180, 181. *Barwell v. Kensley* and others.

To the killing the plaintiff's mastiff. 2 Keb. 237. *Wright v. Wranescott*.

To a justification for digging in a common. 1 Keb. 390. *Cove v. Canthorn*.

Inclosing part of the common for the enlargement of his messuage. 1 Lev. 62. *Nevill v. Hamerton*.

A plea as to the enclosure not guilty, and as to putting in the cattle prescribes for the tenants and occupiers of those lands to which he conveys a title. 2 Mod. 274. *Birch v. Wilson*.

Where a plea was held ill to an action for diverting a water-course. 3 Lev. 209. *Biddlesford v. Onslow*.

What

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What plea was adjudged ill in an action upon the case for erecting a nuisance. 3 *Keb.* 40. *Aylet & Ux. v. Onslow.*

What have been held good Pleas, and what not in this Action, relating to the following Particulars.

An action against the sheriffs for an escape upon *mesne process*, and a rescue pleaded. 2 *Cro.* 419. *May v. Proby & al.*, *Anonymous.*

What was held an ill plea by the sheriff, to an action for an escape. *Ray* 100. *Clerk v. Molineux.*

Where a replication was held ill in an action for an escape upon *mesne process*. 1 *Lutt.* 131. *Whitrow v. Edwin, & al.*

To an action for an escape, what plea hath been adjudged good. 1 *Brownl.* 15. *Wilson* against the sheriffs of *London.* 1 *Cro.* 67. *Clecott v. Dennys.* 1 *Cro.* 624. *Baron v. Aldeworth.*

Plea, that the defendant was let at large upon a writ of privilege, and ill. 1 *Cro.* 893. *Colston v. Ross.*

P *437. An action upon the case was brought against an innkeeper of *Stratton Audley*, in the county of *Oxon*, and the plaintiff declared upon the common custom of the realm, that an innkeeper should keep the goods of his guests safely, &c. The defendant pleaded, that when the plaintiff lodged with him, he was sick, and of *non sane memory*, by occasion of his sickness whereof he then languished; and it was thereupon demurred *and adjudged without argument for the plaintiff; for the defendant, if he will keep an inn, ought at his peril to keep safely his guest's goods; and although he be sick, his servants then ought carefully to look to them; and to say he is of *non sane memory*, is no excuse; it lieth not in him to disable himself, no more than in debt upon an obligation; wherefore it was adjudged for the plaintiff. 1 *Cro.* 622. *Crofs v. Andrews.*

Fourthly, Of the Trial, Evidence and Damages.

1. Where a trial was put off in an action brought against a woman's father for taking her away from her husband, till the marriage was determined in the court christian then in litigation there. 1 *Ven.* 37. *Anonymous.*

2. What has been held a mis-trial in an action for disturbance of common. *Richmond v. Webb* *Cro. Eliz.* 114.

3. Where the court would not grant a new trial in this action, where the jury gave a verdict for the defendant upon doubtful evidence. 5 *Mod.* 87. *Smith v. Crompton.*

4. Where a new trial was denied in an action for misusing a horse, upon an allegation that the jury tossed up, whether the verdict

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verdict should be for the plaintiff or defendant. 1 *Keb.* 811. *Prior v. Powers.*

5. What would have been a mis-trial in an action brought by one of the judges of the sheriff's court, for disturbing him in taking the fees of his office. *Hard.* 311. *Proctor v. Phillips.*

6. Where the jury in an action upon the case for a false return to a *mandamus*, gave a verdict for the defendant against the opinion of the court; and a motion was made for a new trial after the trial at bar; and *Holt* said, he had never known the like, and that he would have but little value for the verdict of a jury, that would not at a judge's desire declare the reason which had induced them; and that as the judges do publicly declare the reasons of their judgments, and thereby expose themselves to the censures of all that be learned in the law, and yet there is no law obliges them to it, but it is for public satisfaction; so the jury ought for the same reason to declare the reason of their verdict when required by the court; notwithstanding all this, it being a trial at bar, the court would not grant a new trial. *Farresley's Rep.* 37. *Gay v. Gros.*

7. Whether the action abated where one of the defendants died after the *venire*, and before the day of *nisi prius*, in an action of escape brought against them as sheriffs. 1 *Cro.* 625. *Bennion v. Watfon.*

8. Where it was held that there was no proper *venue* in an action for abusing a horse in a journey. *Ray.* 187. *Horseley v. Potter.* 2 *Keb.* 620.

9. Where the *venue* was denied to be changed in an action for a rescue. *Chute v. Hall.* 1 *Keb.* 273.

10. Where the *venue* was objected to, in an action for disturbance of common. *Hob.* 326. *Clerke v. Wood.* *Hutt.* 391. *Jones* 2. 1 *Keb.* 279. *Hart v. Hunblet.*

11. From whence the *venue* shall arise in an action against the sheriff for not returning his writ. 2 *Keb.* 362. *Mancer v. Smith.*

12. Where an action upon the case was brought against the mayor, for refusing to admit a freeman's vote at an election of a new mayor, and the plaintiff is nonsuited, the defendant shall not have double costs, it not being within the intent of the statute. 2 *Lev.* 250. *Herring v. Finch.*

13. What was adjudged no mis-trial by reason of an improper *venue*. 2 *Mod.* 23. *Naylor v. Sharplefs.*

14. That an executor shall not pay costs, who is nonsuited in an action brought against the sheriff for an escape upon an *outlawry*. 2 *Cro.* 360. *Barrett v. Winchcomb.* 1 *Roll's Rep.* 78.

*15. Where the *venue* shall arise from an action for an escape. P *438. *Richbell v. Goddard.* 1 *Cro.* 271, 625. *Bennion v. Watfon.*

16. Whether a freeman of a corporation can be a witness to prove a right to take toll for a market within that corporation. 3 *Keb.* 12. *Cook v. Baker.*

17. Where

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17. Where evidence was held insufficient, and upon a demurrer thereto, in an action upon the case, for digging a hole in the highway, whereby the plaintiff lost his gelding. *Stile* 335.

18. An action was brought against a man for rescuing a prisoner, from an arrest, and the defendant in the action, *i. e.* the prisoner, was admitted to be an evidence for the defendant, but his credit left to the jury. *Wilson v. Gary. Mad. Cases* 211.

19. Where a variance between the title given in evidence and that set forth in the declaration, was held not to vitiate. 1 Cro. 335. *Ferrer v. Johnson.*

20. On an issue of levancy and couchancy, it is enough to prove he fed them in the yard. *Salk.* 169.

21. An action upon the case was brought against the defendant late sheriff of *Essex*, and the declaration was; and whereas the plaintiff had recovered against *Pyndar* 100 l. and had sued out a *fieri facias*; that the defendant, by virtue thereof levied 28 l. and had not returned the writ, nor paid the money to the plaintiff; the defendant pleaded not guilty; and now upon evidence to the jury, it was proved, that the writ was delivered to *Cowell* the defendant, under-sheriff the ninth of *November*, 34 *Eliz.* and the same day, a writ of discharge was delivered him, dated the sixth of *November*, 34 *Eliz.* but because he did not prove that he had notice of this writ of discharge before the execution served, the court held clearly that he was yet sheriff, and chargeable to the plaintiff's action; the defendant also shewed the indenture, whereby he made *Cowell* his under-sheriff, wherein was an exception, that he should not meddle with the execution of any writ above the sum of forty pounds, so as to that he was not his under-sheriff, but he did it *de son tort demesne*, and the defendant is not chargeable therewith; but all the court held it to be a void exception; for when he made him his under-sheriff therein, it was included that he should execute all writs; and therefore the exception is repugnant and void. Thirdly, it was alledged that this was not a due execution; for *Pyndar* had made a deed of his goods before, &c. and shewed the deed dated the same day of the writ of execution, *Et per totam curiam*, although the gift was *bona fide* made, yet execution might be taken of those goods; for by suing forth the execution, all the defendant's goods are liable, so as no gift of the said goods, the day of the date of the writ, or afterwards, can stop the execution. Wherefore they resolved the jury accordingly, without enquiring of the fraud, and they found for the plaintiff. *Vide* 4 H. 6. 7. 17 *Aff. Plac.* 2. 5 *Eliz.* *Dyer* 219. 1 Cro. 440. *Boucher v. Wifeman.*

22. In pleading, the prescription was for common for sheep, and issue joined thereon, and the jury finds common for sheep and cows too; and it was adjudged, that the issue was found for the plaintiff who claimed the common. *Burges v. Steer, 1 Show.* 347.

23. Where

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23. Where the want of a request to remove a *nusance*, was adjudged to be cured by a verdict. *Tomlin v. Fuller*, 2 *Keb.* 583.

24. What shall be intended after a verdict, in an action for diverting a water-course. *Yelw.* 161. *Stone v. Bramwich*.

25. An action upon the case was brought for stopping a light. *Winnington* excepted in arrest of judgment, that *Stagg* possessed of a term assigned to *Cornelius*, who the 29th of September, 23 *Car.* 2, assigned to testator; and the plaintiff as administrator brings the action for building a house contiguous, and damages are given for a year before the *title of the plaintiff began; but it appearing the light was stoped before the testator's time, and the action is brought only for the continuance after, it is well enough; but the request to remove being in the testator's time, and in his own likewise, the damages are for all, and so ill, because, there is no remedy for the *nusance* in the testator's life-time, on 4 *Ed.* 3. though there be colour for it; and so not like the case of an assignor, who can have damages but for his own time; and so it would be well enough; and judgment was staid. 2 *Keb.* 835. *Jefferson v. Hutchins*.

26. Where a verdict was held good in an action for a disturbance in an office, though the title to the office was somewhat variant from that in the declaration. *Ferrer v. Johnson*, 1 *Cro.* 335.

27. Torts are in their nature several, so that one defendant may upon the trial be found guilty, and the other not; but it is not so in actions upon contracts. 2 *Ven.* 151.

28. Whether an action for an escape be local or transitory. *Stile* 107. *Wright v. Martin*.

29. An action upon the case was brought for rescuing goods distrained for rent, and the plaintiff declared upon a lease for years, and that given in evidence was a lease for years subject to a quarter's warning; this was held not to vary from the lease declared on. *Mod. Cases* 215. *Dod v. Mogger*.

30. Where the party was allowed full costs, though but one penny damages. 3 *Keb.* 31. *Brown v. Taylor*.

31. In an action upon the case for disturbing the plaintiff in the enjoyment of a church seat, which he prescribes for himself and family, without saying that he used, or ought to repair it, or some other consideration; after a verdict for the plaintiff, the declaration was held good; for without reparation he cannot prescribe, therefore it shall be intended to be given in evidence; but upon a demurrer it would have been naught.

32. In an action on the case for managing the defendant's ship so negligently, that it ran over the plaintiff's barge; the declaration set forth, that he was possessed of the said barge, laden with divers goods and merchandizes; and first, *Holt* chief justice would not suffer the pilot to be a witness, because he was answerable to the master, if faulty in steering. 2dly, He would not suffer any damages to be recovered for the goods, because not set forth particularly;

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ticularly ; saying they ought to be set forth specially ; as where an action is brought for burning his house ; so in case for words, *per quod* she lost her marriage with *J. S. & aliis personis*, he said he would not suffer them to give in evidence, a loss of marriage with any body but *J. S. Salk. 287. Martyn v. Hendrickson.*

Fifthly, *Of the Judgment and Execution.*

1. Where a judgment was arrested, because there was more comprised in the writ than in the declaration relating to an annoyance by making a ditch, &c. *Norton v. Palmer, Cro. Eliz. 829.*

2. A writ of error was brought upon a judgment in the common pleas, in an action upon the case, for disturbance of the plaintiff's common, in a place called the *Lakes* ; and shews the prescription of common, and the disturbance by digging 40000 turfs, and making of a fish-pond ; and the defendant pleaded that he was lord of the manor, and improved the said several parcels according to the statute, leaving sufficient common in the residue ; issue being thereupon, the jury found *quoad* the parcel where the digging of the 40000 turfs was, that the defendant had not left to the plaintiff sufficient common, and assessed damages 5 s. and costs ; and *quoad* the digging of the fish-ponds, that the defendant had left unto him sufficient common ; and upon this verdict judgment was given for the plaintiff, for the first which is directly found against the defendant ; and for the other part for digging of the fish-pond judgment for the defendant, and the plaintiff in *miseriordia*. And hereupon the error assigned was, that this verdict was repugnant and void ; and the judgment being for the defendant for part is erroneous, and of that opinion was *Berkley*, because it is one entire issue ; but *Croke* held that the verdict is good enough, for it is *in diversis respectibus*, and it may be he had sufficient common notwithstanding the fish-pond, and had not sufficient in respect of digging the turfs ; so the damages to the plaintiff is only by reason of the digging of turfs ; and *Jones* doubted thereof. 3 *Cro. 495. Reeve v. Digby.*

P * 400.

3. An action was brought, wherein the plaintiff declared, that one *Veer* the 29th of *September*, 16 *Car. 2.* was retained as his servant for nine years, that he served him five years, that the defendant the last day of *October*, 21 *Car. 2.* enticed him to depart the plaintiff's service ; and the first day of *November* the same year, the servant departed, whereby the plaintiff lost the profit of his service. It appeared that the nine years were not then expired, for which reason the judgment was arrested. For though it was an error in the jury, yet the plaintiff was the cause of it ; for the jury finding the issue for the plaintiff, they ought to assess the damages, as the plaintiff had alledged them in his declaration ; and there it appeared, that the plaintiff had alledged his damages, as well for the loss of the

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the service, for the remainder of the term, as for the procurement to depart. 2 Saund. 171. *Hambleton v. Veer*, Ray. 200. 1 Lev. 299.

4. Where the court compelled the plaintiff to enter up his judgment, that the defendant might plead it to a new action. *Hard.* 219. *Andrew's Case*.

5. The plaintiff brought an action on the case for a disturbance in a common, and declared, that he was possessed of a messuage, and so many acres of land, with the appurtenances in, &c. for a certain term of years yet to come and unexpired; and that *per totam idem tempus habuisset, & gaudere debuisset communiam pasturæ pro omnibus averiis levan' & cuban', &c.*

Upon not guilty pleaded the cause was at issue; and the plaintiff had a verdict; and serjeant *Tremaine* moved in arrest of judgment, because the plaintiff had not shewn any title in himself, either by grant or prescription; *sed non allocatur*.

Chief justice said, this might be a good exception upon a demurrer, but it is cured by a verdict. 4 Mod. Rep. 175. *Hill v. Gallop*.

6. An action upon the case was brought against the defendant as sheriff of *Kent*, reciting a judgment at the plaintiff's suit, against *William Dyke* for 400 l. and a *fieri facias* thereon delivered to the sheriff; that though *Dyke* had several goods and chattels, yet he had neglected to seize them, and made a false return of *nulla bona; non cul.* was pleaded, and on a trial before the lord chief justice *Holt*, the case came out to be thus. *Dyke, Brown*, and others were partners of several sums of great value, *Brown* being indebted, a *fieri facias* was sued out against him, and thereon these goods were all seized, and in the sheriff's custody, and consequently not liable to the plaintiff's execution. It was held by *Holt* chief justice, that being once seized, and in custody of the law, they could not be seized again by the same, or any other sheriff, and if they were sold thereon, such bargain would be void. It was held also, that though they had a joint and undivided interest, yet only the share, or part of *Brown*, and no more, could be seized upon the execution against *Brown's* goods; and consequently *Dyke* had goods, and so the return was false, and the plaintiff had a verdict and judgment for 200 l. being the value of the debt. 1 Show. Rep. 173. *Bachurst v. Clinkard*.

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P*441. *Actions upon the Case, by and against Executors and Administrators.

AS the cases in the reports relating to executors and administrators, are for the most part under the title *debt*, I shall not here treat of the duty and office of an executor, what they may do, and what not; and of assets, *de vastavit*, and other matters incident thereto; but shall here confine myself to the following particulars, and refer you to the title *debt* for the rest, where the reports shall be as copiously, and yet with as much convenient brevity abridged as possible.

First, *Of Actions upon the Case to be brought by and against Executors and Administrators.*

Secondly, *Of the Declaration by and against Executors.*

Thirdly, *Of the Pleadings.*

Fourthly, *Of the Issue, Trial and Evidence.*

Fifthly, *Of the Damages and Costs.*

And Sixthly, *Of the Judgment and Execution.*

1. No action lay for the executors at common law, but such as had their commencement by a contract, as debt, covenant, and the like, but not of account; for that was given by the statute of *Westminster 2. W. Jones 173.*

2. So likewise, no actions lay against executors at common law upon the simple contract of the testator, and the only remedy was by a *quo minus* in the exchequer, whereby a man might sue the executor there, because when the suit is commenced there by that writ, it is the suit of the king upon the matter, and not of the party; and the king might at common law sue executors, as in *Stradling and Morgan's Case. Plow. com. fol. 208.* And when the party sued by *quo minus*, the king was to have execution of the debt, and damages recovered; and the reason of the case of *8 H. 6.* is remarkable; for suits upon a *quo minus* are upon the matter the suits of the king. *2 Roll's Rep. 301.*

3. The statute of the 4th of *Ed. 3. cap. 13.* called the statute *de bonis asportatis in vita testatoris*, gave an action to an executor for the goods of the deceased being taken away; for before that statute, the executor could not have an action of trespass; but if the goods

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were not consumed, he might replevy them, 34 E. 2. Tit. *Avowry*, 257. 17 E. 2. Tit. *Executor*, 105. So if J. S. took the goods tortiously and died, and the goods were consumed, no action of trespass lay against the executor; but if the executors had the goods in their possession, then an action of detinue lay against them. 21 H. 6. 2. *W. Jones* 173, 174.

4. This action upon the case hath received more fluctuating opinions and resolutions than any other action whatsoever, not only from the copiousness of the action, and the great variety of causes that are its foundation, but from the many prejudices it has been forced to struggle with, before it arrived to the maturity in which we now find it.

Before the resolution of *Slade's Case*, in 4 *Cooke* 93. a multitude of opinions there are in the books, that an action upon the case would not lie upon a contract, where the party might have had an action of debt; and the chief reason that seems to be alledged against it is, because in an *action of debt, upon a simple contract, the defendant was at liberty to wage his law; but in this action upon the case he cannot, and therefore, said they, who argued against this action upon the case, it ought not to be in the power of a plaintiff, by turning an action of debt, which is an action of property, into an action upon the case, which favours of deceit, and thereby takes away a man's birth-right, *i. e.* the privilege of waging his law; but the arguments used for it seem to be more prevalent; one of which was, that it appeared plain, that in the register, a man had a right to two sorts of actions for one and the same thing, and had his election to make use of which he pleased; and therefore, because he may have an action of debt upon a simple contract, there is no reason but that he may, if he please, have an action upon the case likewise. P *442.

And the argument made use of with regard to the defendant's waging his law, is rather an argument in favour of this action, because the defendant, by his waging his law, is to be benefitted in his defence by his own oath; and it is not to be sufficiently lamented, but too apparently known, how slight a regard mankind pay to their oath, than which nothing is, or ought to be more pure and sacred; and though it is pretended, that very often a man pays another money when no body is present; and therefore if the defendant could not wage his law, he would be without remedy to get discharged from a debt he had already paid; but that is rather to be imputed to his own fault; for no man need to want a testimony of his having paid money, since scarce any man will be so dilatory and churlish as to deny a receipt to another that pays him money; but wherever that happens, the party may carry witnesses with him, and that will in some measure obviate if not totally remove any difficulty that can be ascribed for want of a testimony of the payment of money.

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And the resolution of this case was made on a conference with all the judges of *England*, for the quieting and appeasing the diversity of opinions, that had been given of one side and the other.

But still some great men since that have been uneasy at that resolution, as may appear in *Vaughan* 101. where he says, that though by that illegal resolution of *Slade's Case*, grounded upon reasons not fit for a declamation, much less for a decision, the natural and genuine action of debt upon a simple contract, be turned into an action upon the case, wherein a man is deprived of waging his law, it is an absurd opinion to think that therefore debt demanded by it, ought to have precedency to the payment of a debt due by simple contract, but quite the contrary.

For, says he, actions of the case are all *actiones injuriarum* and *contra pacem*; and it is not a debt certain in reason of law, that can be recovered by those actions, but damages for the injury ensuing upon the breach of promise, which cannot be known until a jury ascertain what the damages are; therefore a man did never wage his law for a demand uncertain, for he could not make oath of payment of that which he knew, nor what it was, as consisting in damages only.

Now, although the jury give in damages regularly the money promised to be paid, yet that changeth not the reason of the law, nor the form; for still it is recovered by way of damage, and not as a debt is recovered.

Which shews (says he) the action much inferior and ignobler than the action of debt, which by the register is an action of property; and no reason a damage uncertain in its own nature, should be paid before a certain debt by simple contract, which were the first debts, and will probably be the last of the world; for contracts by writing were much later; and there are many nations yet, where letters are unknown, and perhaps ever will be.

P * 443.

*And (further says he) that which is so commonly now received, that every contract executory implies a promise, is a false gloss, thereby to turn actions of debt into actions on the case; for contracts of debt are reciprocal grants; a man may sell his black horse for present money at a day to come, and the buyer may, the day being come, seize the horse; for he hath a property then in him; which is the reason in the register, that actions in the *Debet*, and also in the *Detinet* are actions of property; but no man hath property by a breach of promise, but must be repaired in damages.

5. In *Mich. 9 Jac. 1.* in the case of *Legate v. Pinchion & al.* it was resolved by all the judges, that an action upon the case might be brought against an executor, upon a promise of the testator to pay money due upon a simple contract; and their reason was, that the debt arising upon a loan, and promise of the testator to pay, which was a promise for the payment of a mere debt, and not to do any collateral act; the testator himself could not have waged

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his law, therefore the executor is chargeable in this action, though there be no averment that he had assets; so that as yet the judges had not come into the resolution, that the executor was chargeable upon a collateral promise of the testator, where there was no debt before.

6. But in *Trinity Term*, 13 *Jac. Rot.* 932. reported in 2 *Cro.* 417. in the case of *Sanders v. Easterby*, it began to be resolved, that the action would lie upon a collateral promise of the testator, so adjudged upon a writ of error, and that resolution stands unimpeached.

7. And in *Trinity* the 14th of King *James*, *Cro. Jac.* 404. in the case of *Berrisford v. Woodroffe*, it was resolved, that an action would lie against an executor upon a collateral promise of the testator; and there was a writ of error brought upon that judgment, and no judgment given in error, the party dying *pendente lite*.

8. And in the case of *Clerk and Thompson*, *Cro. Jac.* 571. there is a case where an action was brought, setting forth, that in consideration the plaintiff would marry the testator, he promised he would leave her worth 500 l. and alledgeth *in facto*, that he did not leave her worth 500 l. an exception was taken in arrest of judgment, after a verdict for the plaintiff, that an *assumpsit* lies not against an executor upon a collateral promise of the testator, and that this personal contract by the intermarriage was determined; as if a lease had been made, or as where the debtor marries the debtee, the debt is determined; *sed non allocatur*; for it never was a duty in the life of the baron, nor ever could be released by him; wherefore it was adjudged for the plaintiff. *Note*; this judgment was affirmed in a writ of error in the exchequer-chamber, and justice *Winch* shewed, that such a case was before in the common bench, betwixt *Smith* and *Stafford*, where the baron promised to the feme before marriage, that he would leave her worth 100 l. and three justices there held the action well lay against the executor of the baron; but the lord *Hobart* to the contrary.

9. *F.* brought an action upon the case upon an *assumpsit*, against *C.* in the king's bench, as executor to *A.* and declared, that the testator, in consideration of three pounds paid to him, had promised and undertaken to deliver and discharge a bond, whereby *F.* the plaintiff was bound to him before that time, and alledged the payment of the three pounds; and that the testator had not delivered up the bond, but had put it in suit against the plaintiff; and after a verdict it was moved in arrest of judgment, that an action did not lie against the executor, upon this *assumpsit* of the testator, it being a collateral promise; and upon a writ of error in the exchequer-chamber, judgment was given by *Hobart*, *Winch*, *Bromely*, *Dentham*, *Hutton* and *Jones*, against the opinion of *Tanfield* chief baron; and though the argument of *Tanfield* was, that there were many cases in the king's bench in his time, *against charging an executor

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executor upon a collateral promise of the testator ; but otherwise upon a contract for the payment of money ; and it was allowed that there had been that diversity taken ; yet since that, there had been many precedents upon a good reason, that if it lay against executors upon a contract of the testator, wherein he could wage his law, and they not, *a fortiori* it lies against them upon such a promise, where the testator could not wage his law. And if it had been a covenant of the testator, an action would have lain against the executor ; and there is the same reason that it should lie upon a promise of the testator, where he receives a valuable consideration, and that it seems was the reason of their judgment ; because such promise is in the nature of an executory covenant, as to build an house ; and there was this diversity taken ; when the act of the testator includes a tort, there it will not extend to the executor ; as trover and conversion will not lie against the executor for a trover, &c. by the testator, but otherwise of contracts and promises made by him upon a good consideration. *Palmer* 329, 330. *Carter v. Fossitt*, Cro. Jac. 662.

10. But where the plaintiff declared, that such a day he was possessed of a cow, of the value of 4 l. 10 s. he delivered to the testator to be re-delivered, who sold it for 4 l. 3 s. 4 d. who converted the money to his own use ; the court held the action not maintainable against the executor. *Ray*. 71. *Bayly v. Birles & al'*, Exec' &c.

11. Though the executor is not chargeable for the misfeazance of the testator, yet he is for non-feazance ; as for non-payment of money levied upon a *fi. fa.* *Cro. Car.* 297, 539. *Dickenſon v. Guilford* ; and this difference is agreed, that non feazance is neither *vi & armis*, or *contra pacem*. 9 Co. 50. b. and it is upon this reason, that an action will lie against an executor, for the testator's not setting out tithes. *Registr. Brev.* 48. a. *Vide Saville* 40. 3 *Leon.* 241.

12. It became a question in the case of *Mason and Dixon*, in *Hill* 3. *Car.* 1. whether an action would lie for an escape in the life of the testator ; *Hide and Jones* were of opinion, that it would not, against the opinion of *Dodderidge* and *Whitlock* ; and the reason they went upon was the words of the statute, which are thus : " Where-
" as in times past executors had no action for a trespass done to
" their testator ; as of goods and chattels of the said testator carried
" away in their life, and so such things hitherto have remained
" unpunished ; IT IS ENACTED, That executors in such cases
" shall have actions against the trespassers, and recover their
" damage in like manner, as they, whose executors they were,
" should have had if they were alive." So said they, that statute gives a remedy for goods and chattels only, and not for any other trespass ; as assault and battery, slander, deceit, false imprisonment, and the like ; even it gives no remedy for breaking a close,

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• cutting of trees *in vita testatoris*, according to 11 H. 4. 3. 18 E. 4. 16. 2 R. 3. 2 & 4 E. 4. 5. For these are not goods and chattels; and in this case, although the party was taken, to the intent that the testator might declare in debt, yet it was a trespass to suffer him to escape, which was not a taking of goods and chattels, and there was no wrong to his goods and chattels; and the cases of a trover, ravishment of ward, and ejectment, may be thus answered, that they are injuries to chattels, &c. and in being, and so they held the action not maintainable. *W. Jones* 174, 175. *Latch* 167. and in 3 *Salk.* 160, 161. it is said, that an executor may bring an action *quare blada crescentia in vita testatoris messuit & asportavit*, for corn standing is a chattel, and the mowing and carrying it away was one entire act; but if the cutting was at one time, and the carrying away at another time, then they are distinct acts, and he must sue for the carrying away only. But an executor cannot bring an action of trespass *quare herbam crescentem in vita testatoris messuit & asportavit*, because grass growing is part of the freehold, and not a chattel. 1 *Vent.* 187. *Emerson v. Emerson*. P * 445. Q. If it lies for a false return made to the testator's writ. *Cro. Car.* 297.

13. See the following case, where the plaintiff as executor brought an action against the defendant for a false return; setting forth, that his testator 4 *Jac.* had recovered judgment against one *Smart* for 140*l.* and that he sued out a *testatum fieri facias* against him, which he delivered to the defendant, who made an execution, and levied the goods to the value of 10*l.* and returned, that he had levied only 19*l.* 9*s.* which he was ready to pay; and that he had more goods in his possession to the value of 40*l.* which remained with him for want of buyers, whereas in truth he had levied more. In arguing this case it was said, that an executor may have an action against the sheriff for a false return made in the life of the testator on a *fieri facias*; so hath it been held that he may have an action of trover for any conversion in the life of the testator; and likewise an action of escape upon mesne process, because the body of the prisoner being a pledge for the debt, the executor might be otherwise without remedy; so that though it is true that a personal action dies at common law with the person; yet upon the equity of the statute of 4 *Ed.* 3. cap. 13. *de bonis asportatis in vita testatoris*, a wrong done to his estate still remains. 4 *Mod.* 403, 404. Judgment was given *nisi causa*. *Williams* executor of *Mellish* against *Cary* under sheriff of *Wilts.*

This case is reported in *Comberbach* 322. where the reporter says, that the Chief Justice *Holt* made this distinction, that there is a plain diversity between the case upon a mesne process, which is merely personal, and doth not go to the right, and this case upon execution, by which the property of the whole debt, when goods are taken upon a *fieri facias* is divested out of the defendant; but if
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the sheriff returns *nulla bona*, both parties are concluded and estopped, and thereby the property is restored to the defendant; and as an action would lie in that case, so here in the principal case it being found by verdict, that the goods were worth 40*l.* it is plain he returned *quod resid. nulla bona*; and I conceive (says he) the executor may maintain this action; for it is within the equity and reason of the statute, and almost within the words, and it is stronger than where the body is taken.

Under this case the following remark is made; It must be intended in this case, that it was proved to the jury, that the sheriff acted corruptly, and might then have had money for the goods, else it seemeth the action lieth not.

14. It does not lie against an executrix upon her promise, who in consideration, that the plaintiffs would accept her to be their debtor for 60*l.* due from the testator to *A.* who assigned it to the plaintiffs; she promised to pay to them the 60*l.* for that is not a sufficient consideration. 1 *Saunders* 210. *Forth and others* against *Stanton Executrix*.

15. It was held, that this action would not lie against an executor of an infant, for the debt of an infant, though it was in consideration of forbearance. *Latch* 21. *Stone v. Withipool*.

16. But where an infant and another were bound in a bond for the debt of an infant; the infant at his full age did assume to save the other man harmless against the said bond; afterwards the infant died, it was resolved by the whole court, that upon this *assumpsit*, an action upon the case would lie against the executors of the infant: And if the feme covert, and another at her request had been bounden in such a bond, and after the death of her husband, she had assumed to have saved the other harmless against such a bond, such *assumpsit* should have bound the wife. *Godbolt* 138. *Case* 164. *Barton v. Edmonds*.

P * 446. 17. If a widow after the death of her husband seise his goods without taking letters of administration, although she afterwards dispose of them by will, or otherwise, yet he that takes out letters of administration to the husband, may bring trover for these goods; for an administrator may have trover for goods taken after the death of the intestate, and before administration committed; and although he declares of goods taken out of his own possession, whereas they were taken before he was administrator, yet it was good enough; for the administration shall have relation to the death of the intestate *Per Holt* Chief Justice; though he thought it a hard case. *Comb.* 451.

18. Where an executor, or an administrator, gives an authority to one to receive money for him, the action is to be brought in his own name and right; but if it be payable to a stranger without any such authority, the executor hath his election. *Comb* 214.

19. If

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19. If an action be brought against a special administrator, and the administration determines pending the action, he ought to retain assets for that debt, which is attached against him. *Comb. 465.*

20. If an executrix or administratrix promises, that in consideration the plaintiff would deliver her six barrels of beer, she would pay as well 5*l.* due by the intestate, as for the beer; this is a good promise to charge her out of her own goods. *Cro. Eliz. 406. Wheeler v. Collier.*

21. Where the plaintiff declared, that the intestate was in his life-time indebted to him in such a sum, and the defendant his executor, in consideration that the plaintiff would forbear till he had proved the will, promised to pay the money; this declaration was held good, though the plaintiff did not shew how the debt grew due. *2 Bul. 91. Papworth v. Johnson.*

22. Where the defendant was husband to an executrix, and the testator had devised 7*l.* to his son the plaintiff; and after the death of the executrix, (the defendant's wife) the defendant promised the plaintiff, that in consideration he would forbear to sue for that legacy for such a time, the defendant would pay it; here although the defendant was suable in the spiritual court, inasmuch as the effects came to his hands, yet the defendant had a matter in discharge of himself in the spiritual court, that is he had delivered the effects to the administrator *de bonis non*; and the court held that it was a void consideration, and judgment was entered for the defendant. *1 Bul. 45. Smith v. Jones.*

23. Where a man marries a feme executrix, the administration is devolved on him, and he may bring an *assumpsit* by himself without the wife. *Salk. 117.*

24. If a man brings an action as administrator, when the case of action is in his own right, the naming himself administrator is surplusage. *1 Ven. 119. Hornsey v. Dimock.*

25. An administrator impowers *A.* to receive the intestate's debts, but a will appearing, the administration is repealed; the executor may have an *assumpsit* against *A.* as for money received to his use. *Salk. 27.*

26. The plaintiff declared in an *assumpsit*, that one *J. S.* devised a legacy to the plaintiff, and made the defendant his executor; and the plaintiff intending to sue him for it, the defendant in consideration of forbearance promised to pay the plaintiff. The defendant pleads several bonds and judgments, and that he had not assets *ultra*; whereupon the plaintiff demurred, and had judgment without argument; for his having assets is not material, it being a charge upon his own promise in consideration of forbearance. *2 Lev. 3. 1 Ven. 121.*

27. Where the plaintiff declared, that *S.* was indebted to several persons, and the plaintiff was bound for him, and forced to pay the debts; and the defendant being executor to *J. S.* in considera-

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tion that the plaintiff would forbear to sue him for the money, the defendant promised to pay it; and it was held a good consideration for the promise of the executor. 1 *Lev.* 71. *Scott v. Stephenson.*

P * 447.

* 28. An action was brought against an executor, that J. S. had a judgment against the testator, had made a letter of attorney to the plaintiff to recover and receive the money to his own use; and the defendant, in consideration that the plaintiff would forbear to sue out execution, promised to pay it; though this promise was not made to the plaintiff in the judgment, but to one having authority to sue out execution, it is sufficient; for it shall be presumed the debt was assigned to him, so as he had an absolute power over the execution. 1 *Lev.* 188. *Russell v. Haddock.*

29. For other cases concerning promises by executors and administrators in consideration of forbearance, see *Moor* 685. *Case* 946. 1 *Roll's Ab. fol.* 24. *pl.* 32. *fol.* 25. *pl.* 34. 3 *Cro.* 70. *March v. Cupeper.* *Cro. Eliz.* 9. *Trevanion v. Howel.*

Secondly, Of Declarations by and against Executors and Administrators.

1. An administrator in declaring must shew that administration was granted to him, and by whom, 6 *Mod.* 135. if he sets forth that administration was granted to him, and does not say by whom, and the defendant pleads over, that is an admittance of the plaintiff's being a rightful administrator; if the plaintiff shews that administration was granted by one that had no authority, as if he sets forth an administration by a peculiar jurisdiction, when there appears to be *bona Notabilia*, that shall not be the same, as if he had said that administration was granted, and did not say by whom, but he can have no judgment. 6 *Mod.* 134, 135, 136. *Adams* against the tertenants of *Savage*. And the reason appears to be, that where the matter is indifferent to be well or ill, and the party pleads over, they will intend it well.

2. If the plaintiff set forth, that administration was granted to him by a peculiar *debito modo*, without saying that he had ordinary jurisdiction, or that it did of right belong to him to grant administration. *Per Holt* Chief Justice, it cannot be said to be only form, for it is the committing administration by one having legal authority, that vests the cause of action in the plaintiff; and the ordinary by law is to commit administration; and in all cases of peculiars, you must shew a title and right to grant administration, and the least averment that can do it, is to say, that *de jure* it did belong to him to grant administration; for the court cannot take notice of peculiars, but may of bishops; and a *Profert in cur' Literas Administrat'* is not enough, for they only certify what is on the face of them, viz that administration was committed to the plaintiff by such a one; but that does not import he had any right to grant any.

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But what was said by Justice Powell was, *might not the defendant come and traverse his having right to commit, if you had alledged it*; and in the case of *Chiverton v. Trudgeon*, in 2 Cro. 556. it was doubted whether the right of an archdeacon, who is taken notice of by us, as *Oculus Episcopi*, ought to be shewn; but all the matter is, that here it is said *Debito modo commiss' fuit*, whether that shall be taken only in respect to the legal form of the instrument, or to the peculiar's right of committing; and I rather believe the first, and *Debito modo* seems to me not to be enough to traverse; they might indeed have traversed the administration committed; and given in evidence, that he had not right to commit administration, and no rule was given. 6 Mod. 241, 242. *Denham v. Stevenson*.

3. Where the defendant declared, that in consideration the plaintiff would forbear to sue the defendant as administrator of J. S. who died indebted to him until he married such a one, that he the defendant would pay, &c. The objection was, that the plaintiff had not called *the defendant administrator, or alledged that he was, but only that in consideration the plaintiff would not sue him as administrator, &c. but the declaration was held sufficient. 1 Lev. 222.

P *448.

4. Administration was said to be granted by an official, without saying *cui de Jure pertinuit*; it was good after a verdict. 4 Mod. 133. *Mason v. Hanson*, 1 Show. 355. Comb. 196.

5. In an action against an administrator, the plaintiff need not aver that administration was committed to the defendant. Comb. 465.

6. Before the act of 16, 17 Car. 2. cap. 8. the want of a *Profert* of the letters testamentary made a declaration by an executor ill after a verdict, Cro. Eliz. 551. *Edwards v. Stapleton*, but that was cured by that statute, and by the statute of the amendment of the law it is cured upon a judgment by default; but 2. if the declaration good, if it be shewn specially for cause.

7. An action was brought by the plaintiff as administrator, who declared upon an *Indebitatus Assumpsit*, and a *Quantum meruit* to the intestate, and on an *Insimul computasset*, with the executor; and it was held ill. 1 Show. 366. *Rogers v. Cooke*.

8. In a declaration by a feme administratrix, it is not proper to say, that the money was received *ad usum ipsorum*, though it may be said *ad dampnum ipsorum*. Comb. 311.

Thirdly,

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Thirdly, *Of the Pleadings by Executors and Administrators.*

1. Where trover is brought by a rightful executor or administrator against an executor *de son tort*, he cannot plead payment of debts, &c. to the value, &c. or that he hath given the goods, &c. in satisfaction of the debts, because no man ought to obtrude himself upon the office of another; nevertheless upon the general issue pleaded, such payments shall be recouped in damages; as where the disseisor hath paid the chief rent, &c. that shall be recouped to him in the damages in assise brought against him by the disseisee.

But in an action by a creditor against an executor *de son tort*, the defendant may plead *Plene Administravit*, and give in evidence the payment of just debts, but he cannot retain a just debt to himself, *Carth.* 104.

Where an action was brought upon an *assumpsit* against the defendant as executrix to *John Kent*; the defendant pleaded in bar three several judgments obtained against her as executrix, upon three several bonds, at the suit of three several persons; and that she had assets in her hands, only to the value of 5s. liable to those several judgments.

The plaintiff replieth separately to each judgment, *viz.* that one half of the money recovered on each bond, was more than was justly due from the testator; and the plaintiff in each action was willing, and had offered to accept the other moiety of the defendant in discharge of the whole, and upon payment thereof to release the several judgments; and that the defendant had sufficient assets *ultra*, those judgments were satisfied to pay the plaintiff, and concludes severally after pleading the matters as aforesaid, *viz.* that the defendant *Judicia prædicta deceptivè & ea Intentione ad defraudandum & decipiendum* the plaintiff, had kept the said judgment on foot.

The defendant joined generally, maintaining her bar, that she had not assets *ultra*, and traversed *quod ipsa prædicta* (the defendant) *deceptivè & ea Intentione ad defraudandum & decipiendum* the plaintiff *de damnis suis prædictis de Judiciis prædictis seu eorum alteri exonerari seu relaxari distulit, & adhuc differt, aut Judicia prædicta seu eorum alterum in suis robore & vigore permanere, adhuc permittit, ad defraudandum & decipiendum* the plaintiff *de damnis suis prædictis modo & forma prædictis, &c.*

P * 449. *And upon a demurrer to this rejoinder it was shewn for cause, that the defendant ought to have rejoined severally to every judgment, and so as to include all three judgments in one general traverse, because it must be a great disadvantage to the plaintiff to take issue thereon; for if he should join issue upon the fraud in all the judgments, and if one should be found not to be kept on foot

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by fraud, the issue would be against him; and on the other hand it would be as good an issue to plead generally, that *judicia prædicta* *five eorum alterum* was continued by fraud; and therefore it was inferred that the defendant ought to have made several traverses.

Sed per curiam, the rejoinder is good, because the traverse was, that all or any of the judgments were kept on foot by fraud; and if issue had been joined, that all the judgments were kept on foot by fraud, and it had been found that one of them alone had been kept, &c. by fraud, this issue had been found by the plaintiff, because the plea was false in part, and for that reason the whole is false; therefore this general form of pleading could be no disadvantage to the plaintiff, as is pretended; for he might have taken issue that all were continued by fraud, or else he might have singled out one of the judgments, and taken issue upon that alone.

The plaintiff seeing the opinion of the court, prayed leave to discontinue, which was granted. *Carthew* 195, 196. *Beake v. Kent*.

2. An administration pleaded *plene administravit*, and upon an issue found for the plaintiff, and moved in arrest of judgment, that administration was committed by the archbishop of York, where the intestate had *bona notabilia* in London, and that this appeared within the record. *Per Curiam*: If this was upon a demurrer, they would have taken notice of it; but now the cause being tried, and a verdict being against the defendant, they would not; *ideo* judgment nisi. *Skin.* 237. *Anonymus*.

3. An action upon the case was brought against the defendant as administrator, upon a promise made by the intestate. The defendant pleaded two several bonds in bar, and concluded his plea, with a general *Plene Administravit*, without confessing any assets to be in his hands.

The plaintiff replied specially, that the defendant had assets sufficient, besides what would satisfy the said two bonds; and upon a demurrer to this replication, it was said by the court, that the general conclusion of the plea in bar hath waved the special matter of the bonds; therefore the plaintiff should have replied generally. *Carthew* 208. *Page v. Wats*, it is said that no person appearing for the defendant, judgment was given against him.

4. If an executor *de son tort* delivers the goods to the administrator before an action brought, he may plead *Plene Administravit*, if administration be first granted, and then another takes the goods, he is not thereby executor *de son tort*. *Far.* 31.

5. An action upon the case was brought upon an *assumpsit*, for money received by the defendant to the use of the plaintiffs. The defendant pleads *quod Causa Actionis non accrevit infra sex Annos*; the plaintiff replies, that the party died intestate such a day, and that no administration was granted till such a time, and then administration was granted to the wife; *Et sic Causa Actionis accrevit*,

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vit, and concludes to the country. Here the plaintiff ought not in his replication to have concluded to the country; for the defendant might rejoin that the party made a will, or died intestate; and that administration was granted to J. S. for if one A. dies intestate, and administration is granted to B. and C. receives money, and then administration is granted to D. the six years shall be accounted from the first administration. *Curry & Ux v. Stevens. Comb. 311.*

*Fourthly, Of the Issue, Trial and Evidence.

P *450.

1. Where the general issue, in an action brought against an executor is drawn up, that *non assumpsit*, without saying, either that the executor, or the testator *non assumpsit*, it will be intended by the court, after a verdict, that the testator *non assumpsit*, as in debt against executors, where they plead *non est factum suum*, *suum* shall be intended to signify the testator's bond. 1 *Lev. 184.*

2. On *ne unques Executor* pleaded, the defendant cannot give letters of administration in evidence. *Comb. 220. 221.* But letters *ad Colligendum* he may. *Ibm.*

3. If there be a judgment against an administrator by the name of executor, and if he be sued afterwards as executor for the same cause, he may give the former judgment in evidence. *Comb. 220, 221. Harding v. Salkin executor, &c.*

4. In an action upon the case against an executor, upon *Plene Administravit* pleaded, three points were declared *per Holt Chief Justice*: *First*, that the plaintiff must prove his debt, otherwise he shall recover but one penny damages, though there be assets; for the plea only admits the debt, but not the quantity. *Secondly*, that all separate debts mentioned in the inventory, shall be counted assets in the executor's hands, for that is as much as to say, that they may be had for demanding, unless the demand or refusal be proved. *Thirdly*, that in strictness no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers fees, but not for pall or ornaments. *Salk. 296. Staley's Case, 5 W. 3.*

5. So in the 7th of *W. 3.* Upon a *Plene Administravit*, *Holt* said, if an inventory be produced, where there is one particular of good and bad debts the defendants shall be charged with the whole, because he doth not distinguish them, unless he can discharge any part of it by special evidence. *Note*, here the executor put in a second inventory, somewhat different from the former, and would

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offer that; *sed non allocatur*; no more than one should produce his own answer in chancery, as evidence for himself, but a creditor may charge him with which inventory he pleaseth. And it was ruled, that the defendant must not only prove payment without abatement or collusion, in discharge of bonds, but also that there was a real debt, for which the creditor's oath sufficeth; or if evidence be given, that the testator acknowledged so much due by bond, that may be allowed, for it would have been good evidence against himself.

Note; Sperate debts shall be reckoned as money in pocket, because it is supposed the executor may have them when he will; here was 150 l. charged for the testator's funeral, out of which *Holt* said at least 140 l. ought to be deducted, for 10 l. is enough to be allowed for the funeral of one in debt.

Longueville said, that baron *Powell* in his circuit would allow but 11 s. 6 d. in the like case, which he said was all the necessary charge. *Comb.* 342.

6. Plaintiff, as executor, brought an *indebitatus* for monies of the testator received after his death to the plaintiff's use, and produced the testator's debtor, who paid it as a witness, but he was rejected *per Holt* chief justice; for the plaintiff by bringing this action, determines the election he had of suing the original debtor, or the receiver, and allows of the payment; but the plaintiff being nonsuited, the matter is at large again, and he may sue the debtor; and therefore the debtor swears to discharge himself, and by consequence is no witness.

*It appeared also that another sum of money mentioned in the declaration, was found by the defendant in the testator's room after his death, which he took. P^o 451.

And *per Holt* chief justice; as to that, the plaintiff mistook his action, for he should have brought trover, and not an *indebit'* for money received to his use; and the plaintiff was nonsuited. 6 *Mod.* 151. *Clerk v. Bealey*.

7. Upon an issue on *plene administravit*, the defendant cannot give in evidence, a judgment not satisfied, because it is an administration of another nature than he had pleaded.

Payment of debts *pendente brevi* is no evidence upon this issue, for the plea is *plene administravit* in the *præter-tense*; and this evidence proves an administration only, since the purchase of the writ, and therefore the defendant must plead it specially. 3 *Salk.* 22.

8. In a *scire facias* upon a judgment against the testator, if the defendant pleads *plene administravit*, it is ill upon a special demurrer, because by the plea, the defendant admits that goods came to his hand, and therefore he ought to shew how he administered, that it may appear it was not in paying debts of an inferior nature, and this is in favour of judgments; but upon a general demurrer, such a plea may be good, because the defendant might have paid other judgments,

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judgments, and so shall his plea (which is confessed by the demurrer) be intended.

Note ; the proper plea in this case is *riens inter maines*, at the time of the testator's death. 3 *Salk.* 22.

9. Executors may to an action upon the case, plead a bond not yet due, and the plaintiff may reply assets *ultra* that bond. 3 *Lev.* 57.

10. If an executor declares upon a promise made to the testator, and the statute of limitations is pleaded, he cannot give in evidence a promise to himself within the six years. *Salk.* 28.

Fifthly and Sixthly, Of the Damages, Costs, Judgment, and Execution.

1. If a judgment be had against two, and afterwards a *scire facias* be brought against the administratrix of one of them, after two *nihil* returned, the party may be relieved by her *audita querela*, and will have judgment that she ought not to be charged alone. 4 *Mod.* 315.

2. If an executor brings a *scire facias* upon a judgment recovered by the testator, the letters testamentary must be shewn in the writ. 1 *Shorr.* 60.

3. Where the plaintiff declares upon an *insimul computasset* with the executor, of monies due by the testator, the judgment shall be *de bonis propriis*. 2 *Lev.* 122. *Harves v. Smith.*

4. If an executor promises, in consideration of the forbearance of money due by the testator upon a bond, to pay it at such a day; now inasmuch as notwithstanding a recovery upon this promise, the plaintiff may sue the executor upon the bond; therefore the damages to be given by the jury ought not to be for the whole money due, but only for the non-payment at the day. *Cro. Eliz.* 643. *Chambers v. Leversage.*

5. *Moor* 419. *Case* 575. *Wheeler v. Collier*, where the intestate was indebted to the plaintiff in 17 l. and in consideration that the plaintiff would send him in six barrels of beer, he would pay 20 l. and entire damages were given upon a declaration on this promise, and the judgment was arrested by the whole court; and it was there said, that if the plaintiff has judgment against the executor, upon a promise to pay, in consideration of forbearance to a certain day, it shall be *de bonis testatoris*. *Cro. Eliz.* 406. the same case.

6. So where an executor promises, that if he has goods sufficient come to his hands, he will pay the testator's debt; if goods come to his hands, and he doth not pay, he shall not be chargeable upon this promise out of his own goods. *Cro. Eliz.* 91. *Trevinnan v. Howell.*

on Actions on the Case.

7. *Till* brought an action on the case in the common pleas against *Gale*, as administrator of *T. S.* and there was a verdict and judgment against him; thereupon he brought a writ of error in *B. R.* and there the judgment was affirmed; and now it was moved, that the administrator might pay costs upon this writ of error, because it was his own act, and lay in his own knowledge, and was brought in *dilation executionis*, in which case the statute gives double costs.

But after an adjournment on *Monday* the 27th of *November*, 1693, it was resolved that the administrator should not pay any costs, for that he was not a person within the intent of the said statute. *Carthew* 281. *Gale v. Till*.

8. If the plaintiff as administrator sues upon a judgment obtained by the intestate, and obtains a verdict, and it appears upon the record that the plaintiff is not entitled to his action, the defendant shall not have costs upon the 8th and 9th of king *William 3. cap. 3.* but the court may enter up their judgment; and although a verdict be found for the plaintiff, yet it appears to the court that he has no cause of action; therefore it is adjudged that he hath no benefit by his writ, and may award no costs. *6 Mod. 137.*

9. An action of trover was brought by the plaintiff as administrator of *T. S.* and in the declaration the plaintiff had laid the conversion to be after the death of the intestate, and that administration was granted to the plaintiff. Upon not guilty pleaded, the plaintiff was nonsuited, and the question was, whether he should pay costs; and it is said the better opinion was that he should, because the goods came to him after the death of the intestate, and he might have declared upon his own possession, and not as administrator, which he had done on purpose to shelter himself from costs. *Mod. Cases in Law and Equity* 108, 109. *Cro. Car.* 219. *6 Mod.* 94. *1 Ven.* 109, 110.

10. An administrator shall pay costs for not going on to trial. *Far.* 118.

11. An administrator shall not pay costs upon a writ of error, the judgment being affirmed. *4 Mod.* 245, 246. *1 Mod.* 77.

12. Where the plaintiff declared upon an *insimul computasset* by the defendant with the plaintiff as executor, and was nonsuited, it was held in the case of *Bull and Palmer*. *2 Lev.* 165. that he should pay no costs. *Q.* If it be law.

13. An action upon the case was brought by the husband and wife executrix, declaring, that whereas the defendant was indebted to them as executor of *J. S.* for so much money received by him to their use, as executor, he promised to pay it. And at the trial the plaintiffs were nonsuited; and the question was, whether they should pay costs upon the statute of 23 of *H. 8.* And serjeant *Darnell*, who argued for the defendant said, that as this action was brought by the plaintiff in their own right, and upon a contract with themselves, (that is) the receipt of the money to their use, and which

Readings and Observations

P*453.

which they ought not, at least need not, name themselves executors, and the naming the plaintiff executor, when it is not of necessity, shall not exempt him from paying costs. *Latch* 220. *Hard* 78, 79. and for a foundation for this distinction, he relied upon the book the 2 *H* 7. 15. where the difference is taken between an action brought upon the executor's own possession, and where upon the possession of the testator; and upon this he would reconcile the cases in 3 *Lev*. 60, 375. 2 *Lev*. 165. If an executor brings an action of trover and conversion in the time of the testator, or upon a trover in the testator's time, and a conversion in the executor's time, he shall pay no costs; so upon an *in simul computasset* with the *executor for money due to the testator; and the judgment of the court was, that the plaintiffs should pay costs.

And my lord chief justice's argument not being very long, and containing solid reasoning, I beg leave to recite it: " Says he, If the plaintiff having married the executrix, had ordered, as he might have done, *J* S. to receive this debt, which was due to the testator, and he had accordingly received it, that had been a good payment and discharge of the first debt, and *J* S. would now become indebted to the plaintiff by a contract in the plaintiff's time, viz. by the appointment and receipt; and he in that case might bring an *indebitatus assumpsit* against *J* S. for so much money received to his use as executor. And here, though the defendant received the money without any previous appointment of the plaintiff, yet the plaintiff, by bringing this action, having assented to the receipt, it amounts to an appointment, and a discharge of the first debtor, and makes a contract between the defendant and him. And here the plaintiff need not have named himself executor, it being upon a contract with himself, his saying that it was to his use as executor, is true, and therefore no harm, but rather better, for it shews how the right came; for if here he had been an administrator instead of executor, and declared as such and recovered, and then administration had been revoked, the defendant would be relievable by *audita querela*.

" And it is a true rule, that where the executor need not name himself executor, he shall pay costs upon a nonsuit, and the naming himself executor shall not exempt him from it. And where an executor recovers in a case in which he need not name himself executor, and dies intestate, or makes his executor, who will not prove the will; as to the first testator's goods, his executor or administrator, and not the administrator *de bonis non* of the first testator, shall sue execution, and would be liable to the costs of a nonsuit of him, and not the administrator *de bonis non*. And though here the executor should bring the action in his own name, yet the debt recovered is assets in his hands. If executor lives at *London*, and goods which testator died possessed of are at *Bristol*, yet the executor shall have such immediate possession of

" then,

on Actions on the Case.

"them, that he may maintain trover for them in his own name
 "against any converter of them and the damages recovered shall
 "be assets in his hands; but if he does not recover so much in
 "damages, as really the goods were worth, and that happens not
 "through any fault of his, he shall answer for no more than he
 "recovers; as if the goods be perishable goods, and before any
 "default in him to preserve them, or sell them at due value, they
 "are impaired, he shall not answer for the first value, but shall
 "give that matter in evidence, to discharge himself. But if one
 "takes goods out of his possession, he must sue him that took them,
 "to have an opportunity of discharging himself of answering more
 "in assets than he recovers. So if executors will omit to sell the
 "goods at a good price, and after they are taken from him, there
 "the value of the goods shall be assets in his hands, and not what
 "he recovers, for there was a default in him; and in this case, if
 "the receipt was by the defendant after the plaintiff's marriage
 "with the executrix, the husband alone should have brought the
 "action; but if the receipt were in the wife's time before the mar-
 "riage, the husband and wife ought to join in the action. So *per*
 "*tot. cur.* defendant must have costs. 6 *Mod.* 181. *Salk.* 207.
 "*Jenkins & Ux. v. Plombe.*"

13. Executor brought *assumpsit* for money of his testator had and
 received by the defendant, to the use of the plaintiff, as executor,
 and was nonsuit. And now the court was moved for a direction to
 the master to tax costs. *Et per curiam*: He shall not pay costs, for
 he could not sue but as executor; and it is not material whether
 the money was received by the defendant since the death of the
 testator, or before; for suppose it since, it is not assets in the hands
 of the executor till it is recovered; but in trover and conversion,
 by an executor upon a trover and conversion, in the time of the
 executor, the executor if nonsuit shall pay the costs; for he need
 not name himself executor, and the goods are assets in the executor's
 hands, though he never recover them. 1 *Ven.* 190. So if an exe-
 cutor will not go on to trial according to his notice, he shall pay
 costs for that. *Salk.* 314. *Eaves v. Mocato.*

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14. Upon being nonsuited, the question was, whether the plain-
 tiff have costs upon the statute of 8 *Eliz.* and held not. *Ford v.*
Rolls, Cro. Eliz. 69.

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REFERENCES

TO

PRECEDENTS ON ACTIONS ON THE CASE.

DECLARATIONS.

For Executors and Administrators.

FOR an executor for goods sold and delivered. 1 *Bro.* 14.
Red. Dec. 40.

For an executor upon a promise for the testator to deliver oats.
Bro. 30. *Pl. gen.* 42.

For an executor against an executor of an executor, for money
or hay sold, and for depasturing of cattle. 1 *Bro.* 20.

For an executor of an executor against an executor for money
borrowed, to be paid upon request. *Ro. Ent.* 64.

For an executor for attorney's fees. *Wi. Ent.* 51. 2 *Inst. Cl.*
57. *Cl. Man.* 86.

For an executor against an executor upon a promise to pay money
consideration of forbearance. *Bro. Red.* 88.

For an executor during the minority of an infant executor, for
goods sold by the testator. *Han.* 1.

For an executor upon an account stated with the testator for goods
sold, and money lent. *Bro. Vad. Me.* 30. *Cl. Ma.* 68. 2 *Inst.*
161.

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References to Precedents

For an executor against an attorney for money received, and money lent. *Lev. Ent.* 1.

For Administrators.

By an administrator for goods sold by the intestate. *Cl. Man.* 92.

By an administrator for monies had and received for the intestate's use. 1 *Bro.* 11.

Upon a promise for the forbearance of a suit. 1 *Bro.* 15.

For meat, drink, &c. found by the intestate. *Clift* 49. 2 *Inf.* *Cl.* 153.

The like for work and labour by the intestate. *Thomp.* 10. *Bro. Red.* 111.

By an administrator for non-performance of an award. *Vid.* 14.

By an administrator for trover for money lost by the intestate. *Saund.* 137.

The like for taylor's work done by the intestate. 2 *Saund.* 371.

By an administrator during the minority of the infant, against an administrator for goods sold and delivered. 1 *Bro.* 17.

By an administrator during the minority of the infant, against an administrator, with the will annexed relating to the plowing and tilling of land. *Clift* 51.

By an administrator against an executor, for money received for the intestate's use. *Vid.* 45.

The like for attornies fees. *Bro. Met.* No. 9. *Han.* 4.

By an administrator of goods not administered, either by J. or P. with the will annexed. 2 *Saund.* 371. *Bro. Vad. Me.* 37.

For an administrator during the minority of an executor, for not performing a promise made by the defendant, upon a sale of the interest of a term. *Cl. Man.* 115. *Bro. Vad.* 35.

For an administrator of an intestate, who was cook of a hall in the university of *Oxford*, against a student, for money laid out by the intestate, a *quantum valeret* for meat and drink, an *infirmus computasset*, between the intestate and the defendant. *Clift* 49.

By an administrator against a student of the university of *Oxford*, for meat and drink provided by the intestate. *Clift* 49.

By an administrator where the intestate had begun a suit against the defendant upon two promises; and the defendant, in consideration that the intestate would forbear any further prosecution, promised to pay so much for expences laid out upon demand. *Brown* 15.

P * 456.

* *Against Executors.*

Against an executor, upon a promise made by the testator, relating to goods sold to a stranger by his direction. *Rob. Ent.* 27.
Against

on Actions on the Case.

Against an executor, upon a promise of the testator of the enjoyment of lands. *Thom.* 14.

Against an executor for meat and drink provided for the testator. *Thom.* 21. *Cl. M.* 89.

The like for goods sold to the testator. *Han.* 60.

The like for service. 1 *Saund.* 264.

The like for money lent. *Bro.* 28, 31.

Against an executor, upon a promise made by the testator to save the plaintiff harmless. *Bro. Vad. Me.* 32. 2 *Inst. Cl.* 131.

Against five executors brothers and sisters of the testator, and one other who was outlawed. *Bro. Vad. Me.* 34.

Against an executor for money received for the plaintiff's use. *Re. Dec.* 39.

Against an executor where a co-executor was dead, for money lent to the testator. *Cl. Aff.* 188.

Against an executor by an executor, upon a promise of forbearance. *Bro. Red.* 88.

Against an executor upon a promise relating to marriage. 1 *Bro.* 71. *Han.* 10, 42. *Clift* 4. 1 *Bro.* 42.

The like for curing diseases. *Bro. Red.* 35.

Against an executor upon a promise of forbearance. 1 *Bro.* 45. *Cl. Man.* 82. 2 *Inst. Cl.* 164. 1 *Bro.* 65.

Against an executor by a legatee upon an agreement made by the executor and the legatee, relating to the payment of the plaintiff's legacy. *Thompson* 73.

Against an executor upon a promise of the testator, that in consideration that the plaintiff would marry his nephew, the testator would give the plaintiff all his goods at his death, except 100 l. which he would give his wife, with an averment, that his goods, besides his debts, and the 100 l. to be given to his wife, amounted to 380 l. *Wi. Ent.* 281.

Against an executor upon a promise made by the testator, that in consideration the plaintiff would marry M. the testator promised to pay the plaintiff 30 l. 1 *Bro.* 71. *Clift* 54.

Against an executor where the testator was indebted to the plaintiff, and the defendant having goods sufficient to pay the plaintiff. In consideration that the plaintiff would give him a further day of payment, he promised to pay. 1 *Bro.* 45.

The like of a marriage portion. 1 *Bro.* 65.

Against Administrators.

Against an administrator for curing diseases, and work done for the intestate. *Han.* 59.

The like for the forbearance of a suit. *Han.* 36.

The like for goods sold to the intestate. *Han.* 45.

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The like upon several promises. 2 *Mod. Int.* 73.

Against an administrator during the minority of an executor upon two promises, one on a stated account, and the other a special promise of a legacy. 2 *Bro.* 27.

The like for money had and received by the intestate. 1 *Bro.* 72.

Against an administrator during the minority of an executor, where the testator gave the plaintiff and his sisters all his estate; and upon a discourse, the plaintiff required payment out of the intestate's effects; and the defendant, in consideration of giving a day, promised to pay, &c. 2 *Bro.* 27.

Against an administrator, where the intestate was indebted to the plaintiff upon a bond, and intended therefore to sue out administration; the defendant, in consideration that the plaintiff would not hinder the defendant of letters of administration, and would not sue the defendant for that debt, he promised that the plaintiff should not lose one penny of his debt. 1 *Brow.* 34.

Where the intestate was indebted to the plaintiff upon a bond, and the plaintiff intended to sue the defendant for that debt, in consideration that the plaintiff would forbear the suit, and would give the defendant time for the payment, he promised to pay, &c. 1 *Bro.* 56. *Han.* 36.

Against an administrator where the testator was indebted to the plaintiff for money had and received; and the plaintiff in order to obtain that debt, had sued out a *latitat* against the defendant, and given him notice of it, who in consideration that the plaintiff would not arrest him, and would cease from any further prosecution, promised to pay the costs of suit. 1 *Bro.* 72.

Against an administrator during the minority of an infant.

P *457.

*By Husband and Wife.

For husband and wife administratrix of *A.* for goods sold by the intestate. *Thom.* 71.

The like for goods sold after coverture by the administratrix. *Bro. Vad. Me.* 27.

For husband and wife administratrix for 20 l. due to the intestate upon a promise made to the administrator after coverture. *Bro.* 68. *Cl. Man.* 54.

For husband and wife for money lent the defendant by the wife, while she was sole. *Re. Dec.* 107.

Against Husband and Wife.

Against an administratrix and her husband, upon a promise made by the woman when sole. *Rob. Ent.* 105. *Vid.* 95.

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on Actions on the Case.

Against husband and wife for goods sold to the wife whilst sole.

2 Bro. 28. *Clift* 87.

Against husband and wife, in consideration that the plaintiff would receive into his house his wife when sole, and would find her meat, drink and lodging, that she would pay as much as it was worth.

Bro. Red. 29.

Against husband and wife executrix, for money paid by the plaintiff for the testator. Bro. *Vad. Me.* 38.

By a surviving Partner.

Vide Title, For good sold and delivered, &c. and bills of exchange.

By a surviving Merchant.

Vide Title, For goods sold and delivered, &c.

By the Usher of the Black-Roa.

Vide Title, For fees.

DECLARATIONS IN ACTIONS UPON PROMISES IMPLIED.

For Money Lent.

To be paid upon request. 1 Bro. 12, 71. *Mo. Int.* 10; 12. *Ven.* 254. Bro. *Vad. Me.* 1, 2. *Cl. Man.* 95.

To be paid at such a feast. *Pl. Gen.* 45.

For money received and borrowed of the plaintiff; and in consideration thereof the defendant promised to pay the same to the plaintiff, or to his order, upon demand, with interest. Bro. *Mes.* Nov. 31.

For Money had and received to the Plaintiff's Use.

For money received to the use of the plaintiff. *Mo. Int.* 6, 11. Bro. Red. 11. 2 *Saund.* 117. 208.

Where the defendant promised to pay 1218 guilders to the value of 21 l. for so much money before that time had and received to the plaintiff's use. Bro. Red. 80.

The like of 450 guineas. *Clift* 81.

For

References to Precedents

For Money laid out and expended.

In consideration the plaintiff had paid 20 l. to the defendant, the defendant promised to pay the same to one S. to the use of the plaintiff. 1 Bro. 11. 2 Ven. 254.

In consideration the plaintiff had bought coals for the use of the defendant, the defendant promised to repay the plaintiff so much as he paid for the same. Bro. Red. 85.

Where there was a discourse between the plaintiff and defendant concerning a demise of lands, and repairing them; and in consideration that the plaintiff would rent the tenements, and repair them at his own expences, they being then in decay, the defendant undertook to pay so much money upon demand, as the plaintiff should lay out about the repairs. 1 Bro. 12.

Where the plaintiff, at the special instance and request of the defendant, had paid him 50 l. in consideration thereof, the defendant promised to pay the money to W. to the use of L. the like promise for 70 l. and another for 100 l. 1 Brown. 5.

In consideration the plaintiff had bought for the defendant 4 tons of pewter, and had shipped, and consigned it to parts beyond sea, to the use of the defendant, he promised to pay, &c. Bro. Red. 78.

For Work and Labour.

For taylor's work, and for necessaries found and provided for the same. 1 Bro. 71. Tho. 12. Han. 52. with an account stated added. Han. 2, 10.

For work and labour in a glass-house. Cl. Man. 68.

For smith's work. Cl. Man. 100.

For printer's work. Re. Dec. 58.

For work and labour in making spraywood. Clift 85.

For weaving periwigs. Cl. Man. 83.

A *quantum meruit* for buying and carrying several goods and merchandizes. Clift 906, 509.

For work and labour in corking a ship. Clift 910.

In consideration the plaintiff would find workmen to cut wood, and bind it into bundles, the defendant promised to pay the money laid out, and for the workmens wages, and a *quantum meruit* for the same. Han. 18.

An *indebitatus assumpsit* for plaisterer's work, and for the materials. Mo. Int. 3.

The like for bricklayer's work. 2 Mo. Int. 37.

P * 458. *The like for repairing and building houses. Re. Dec. 20. 2 Mo. Int. 38.

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on Actions on the Case.

For Goods and Merchandizes, and other Things sold and delivered, or to be delivered.

That in consideration the plaintiff had sold six bushels of peas, the defendant would pay so much as the best peas should be sold for, at the next market upon request. 1 *Brow.* 28.

In consideration the plaintiff had permitted the defendant to carry away so many bricks and tiles as he pleased, the defendant promised to pay for the same, so much as bricks and tiles were sold for in that country on request. 1 *Brown.* 28.

Upon sale of a gelding where part was paid, and a promise for the rest at such a feast. 1 *Brown.* 29.

For the sale of coal sold and delivered at the rate of 40s. per load. *Han.* 56. The like for goods sold and delivered. 2 *Inst.* C. 123.

That the plaintiff being possessed of lands on the demise of the defendant for three years to come: that the defendant in consideration of 12d. paid by the plaintiff, undertook to pay to the plaintiff 10l. upon demand; and if the defendant did not turn the plaintiff out of possession by a suit in law, and should not cause a demise which he had formerly made to be rendered void before the end of the term. *Bro. Red.* 117.

In consideration the plaintiff had sold the defendant two oxen for which he promised to pay 10l. upon demand. 1 *Brown.* 40. *Bro. Vad. Me.* 3.

Against husband and wife, in consideration the plaintiff had sold the defendant's wife before her marriage divers merchandizes for 29l. which she promised to pay upon demand. 2 *Brown.* 28. The like. *Clift* 87.

In consideration that the plaintiff would sell the defendant the grass growing upon the pasture for 5l. defendant promised to pay the money upon request. *Tho.* 12. The like. *Clift* 61. and so much to plaintiff laid out for mowing, &c.

For turnips growing and sold. *Clift* 64.

For hemp and grass growing and sold. *Clift.*

For shoes sold. *Id.* 85.

In consideration that the plaintiff would sell the defendant 18 bushels of barley, at the rate of 2s. 6d. per bushel, the defendant promised to pay the plaintiff upon demand. *Tho.* 18.

The like for barley shipped on board a ship, and to pay for such work and labour. *Clift* 909.

Assumpsit for money upon promises, in exchange for goods of the plaintiff with goods of the defendant, and reciprocal promises between the parties, upon which the plaintiff hath performed, and the defendant not. *Vid.* 53. *Clift* 71, 72.

The

References of Precedents

The like for money on a promise, in exchange of the plaintiff's mare for the defendant's horse. *Ro. Ent.* 63. The like of a gelding for a gelding, and 40 bushels of oats. *Clift* 73.

The like of a mare and 40 bushels of coals. *Id.* 90.

Indebit' assump' for 40 l. for butcher's meat sold. *Han.* 60. *Cl. Man.* 91.

In consideration that the plaintiff would sell the defendant cattle at several prices, the defendant promised to pay upon demand, whereof part was paid. *Bro. Red.* 23. *Cl. Man.* 92. 2 *Inst. Cl.* 120, 122.

For sheep sold, and depasturing. *Id.* 65.

In consideration that the plaintiff would sell the defendant 10 sheep for 4 l. the defendant would pay at such a day. *Mo. Int.* 9. The like. 2 *Inst. Cl.* 124.

For bread sold and delivered. *Cl. Man.* 95. The like for lead. *Cl. Man.* 91.

In consideration that the plaintiff would sell 10 yards of frize, &c. that he would pay the value of them. *Cl. Man.* 101. 2 *Inst. Cl.* 144.

For malt at the rate and price of 2 s. 4 d. *per strike.* 2 *Inst. Cl.* 144. *Cl. Man.* 102.

For as much as cloths sold, called *Devonshire* kerseys were worth. *Cl. Man.* 103.

The like for tobacco and pipes upon a special *colloquium.* *Cl. Man.* 104.

An *assumpsit* to pay the plaintiff for *Spanish* cloth sold by him to J. S. if he made default in payment of the same. *Cl. Man.* 112.

By a special original in the king's bench, where the defendant, in consideration that the plaintiff had sold and delivered him a mare for 5 l. promised to pay the said sum to the plaintiff. *Cl. Man.* 122.

For firewood bought to be paid at a day to come. *Re. Dec.* 42.

For stocks of root-wood sold to the defendant. *Re. Dec.* 66.

For beer sold by a brewer. *Cl. Ass.* 184.

Where the defendant promised to pay, *at such a feast*, the remainder of money due for lambs sold. *Cl. Ass.* 230.

P *459. *By a surviving partner for an horse sold and delivered, and a *quantum valebat* for the same. 2 *Mo. Int.* 77. 2 *Saund.* 122.

By a surviving merchant on an *indebitatus assumpsit*, for money lent, and for goods sold and delivered. 2 *Mod. Int.* 79.

Upon an *assumpsit* for a ship sold and delivered, and another *assumpsit* for money had and received. *Bro. Red.* 74.

An *indebitatus assumpsit* for money sold and assigned in the orphan's fund. *Clift.* 57.

By an assignee of a bankrupt for goods sold to the defendant by the bankrupt. *Cl. Ass.* 282. *Clift* 75.

For medicines sold and delivered. *Cl. Man.* 94.

on Actions on the Case.

In consideration that the plaintiff had sold the defendant 48 packs of wool, the defendant promised to pay 16 d. *per* pound, or according to the best price, in the month of *October* next following. *Clift* 58.

For a gold ring with seven precious stones set therein, sold for 60 l. to be paid at the birth of the defendant's first child. *Bro. Vad. Me.* 4. The like for a mare. *Clift* 62.

That the plaintiff sold to *D.* 4 oxen for 30 l. to be paid upon the delivery, and part thereof paid; the defendant in consideration the plaintiff had delivered to the said *D.* the oxen, promised to pay the plaintiff. *Ro. Ent.* 8.

An *indebitatus assumpsit* for divers wares and merchandizes sold and delivered. *Cl. Man* 80. *Re. Dec.* 36, 61.

In consideration that the plaintiff had sold the defendant 9 weighs of cheese at such a price, the defendant promised to pay for the same at such a feast. *Pl. Gen.* 21.

That the plaintiff sold the defendant 50 pieces of cloth containing 2721 ells at the rate of 2 s. 6 d. for every ell, amounting to 351 l. which the defendant promised to pay within two months after the delivery; and upon the delivery thereof promised to procure *A.* to be bound for the payment of the money at the same time. *Vid.* 97. *Ro. Ent.* 110.

Other special Promises for Payment of Money.

To pay so much money if the plaintiff should prove *N.* to be a confederate with robbers. *Re. Dec.* 29.

To pay 2 s. for every day the defendant should keep two geldings of the plaintiff's beyond ten days. *Cl. Man.* 71.

In consideration that the plaintiff would permit the defendant to carry wood out of the plaintiff's close, the defendant promised to pay the plaintiff so much money, as the plaintiff should sustain damage by carrying the wood. *Brown.* 36.

In consideration that the plaintiff would wave his part of the goods, which descended to him from his father for his part, the defendant promised to pay the plaintiff 30 l. *Ro. Ent.* 32.

In consideration that the plaintiff would pay to the defendant all sums of money which the defendant, as his attorney, should lay out in prosecuting *W.* at the plaintiff's suit upon a bond, and the defendant's fees, the defendant undertook, that if he should not recover the money due, to pay the plaintiff out of his own monies. *Ro. Ent.* 35.

Where the plaintiff had impounded cattle damage fezant, and at the defendant's request had delivered them again. In consideration thereof the defendant undertook, that if the cattle were not brought back to the pound (to be from thence discharged by law) to pay the plaintiff 100 s. *Ro. Ent.* 102.

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In consideration the plaintiff being an innkeeper would permit the defendant to be tapster in the inn; the defendant undertook to pay the plaintiff 20 s. for every hogshead upon demand, after it should be sold. 1 *Brown*. 58.

That one S. was indebted to the plaintiff in a sum not exceeding 12 l. and that the defendant (as he alledged) was indebted to S. in 12 l. in consideration that the plaintiff would procure an order under the hand of S. for the payment of the money which the defendant owed S. or any part thereof, the defendant promised to pay; another promise, that in consideration the plaintiff had procured an order from one S. directed to the defendant, and thereby required the defendant upon sight thereof to pay the plaintiff 5 l. and place it to the account of S. the defendant promised to pay, &c. 2 *Ven* 69.

That J. had pawned a cup to the plaintiff for 60 l. and in consideration that the plaintiff would deliver the cup to the defendant, the defendant promised to pay, &c. 1 *Brown*. 54.

The defendant being enlisted for a soldier to go beyond sea, in consideration the plaintiff would procure his discharge, the defendant promised to pay the plaintiff 8 l. 1 *Brown*. 10.

P *460. *In consideration the plaintiff being a baker, would give the defendant, a miller double toll for grinding his corn; the defendant had undertaken to carry the plaintiff's corn from any market-town to the mill, within 14 miles from thence; and in consideration the plaintiff would release the defendant from the promise, and carry the corn himself to the mill, the defendant promised to pay the plaintiff ten pounds. 1 *Brown* 81,

The plaintiff at the request of the defendant had endeavoured for the king's pardon for the defendant committed for murder; and the defendant afterwards, in consideration thereof, promised to pay the plaintiff 100 l.

Where the plaintiff by his industry had obtained the king's pardon for the defendant's son, and one S. indicted for felony, and had laid out 42 l. therein. In consideration thereof, the defendant promised, that if J. S. would not pay the said 42 l. within a year, that he would pay the same. *Bro. Red.* 28.

In consideration that the plaintiff would go to the master of the rolls, and shew an authority, which the plaintiff had for vacating a recognizance in chancery, the defendant promised to pay the plaintiff 5 l. or give him a gelding before such a time. *Ro. Ent.* 31.

In consideration that the plaintiff would obtain for the defendant the office of the queen's gun-maker, the defendant promised to pay the plaintiff 20 l. *Ro. Ent.* 74. 101.

In consideration that the plaintiff would procure the defendant to be tenant of an inn, the defendant promised to pay the plaintiff 5 l. *Ro. Ent.* 69.

The defendant had published a felonious taking of several goods; and in consideration that the plaintiff, or any person would give notice

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notice of the goods, so as they might be restored, the defendant promised to pay 20 l. to such person, who should give such notice. *Bro. Met. 6.*

Declarations upon Promises to deliver somewhat to the Defendant.

In consideration that the plaintiff would pay the defendant money due to him upon a bond, the defendant promised to deliver up to the plaintiff the bond to be cancelled. *1 Brown. 29.*

That the defendant had sold to the plaintiff fifty combs of barley for 20 l. the defendant in consideration of 6 d. paid in hand, and 20 l. at the delivery of the barley, undertook to deliver the barley at the plaintiff's house, before such a feast. *1 Brown. 67. Tho. 18. Clift 96. 97. Hern 123.*

In consideration that the plaintiff had undertaken to pay the defendant 8 l. upon demand, the defendant promised to deliver to the plaintiff 40 dozen of candles upon demand. *1 Brown. 67. The like for tallow not delivered. Clift 91.*

The like for sheep-skins. *Clift 93.*

The like for cubit wood. *Clift 26.*

The like for wine fold, and not delivered. *Clift 938.*

In consideration of a gelding delivered to the defendant, he promised to re-deliver it to the plaintiff at such a time, or pay for the same. *Pl. Gen. 43. Cl. Man. 77. Re Dec. 14. Clift 64.*

In consideration that the defendant had lent the plaintiff a saddle, he promised to re-deliver it. *Clift 90.*

The like for sacks lent to the defendant. *Cl. Man. 110.*

For not delivering hops according to the defendant's bargain. *Bro. Vad. Me. 11. Clift 92, 94. The like for hempseed. Clift 94.*

The like for hay. *2 Inst. Cl. 125.*

The like for a horse. *9 Mod. Int. 33.*

The like for wheat. *Clift 96.*

The like for barley. *Clift 97, 99.*

The like for bricks. *Clift 99.*

The like for trees. *Ibid.*

That the plaintiff had delivered to the defendant goods as a pledge for money borrowed, which the defendant upon tendering the money, refused to re-deliver. *Bro. Red, 69. Bro. Vad. Me. 10.*

In consideration that the plaintiff would execute a bond to the defendant, for the payment of 60 l. at such a feast, the defendant promised the plaintiff such goods. *Pl. Gen. 60.*

For an executor in consideration of 66 s. and 8 d. paid the defendant by the testator, the defendant promised to deliver ten quarters of oats at such a day. *1 Brown. 30.*

That the plaintiff delivered to the defendant a gold chain to keep safely, in consideration thereof, the defendant promised to deliver the

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the chain, or pay 30 l. at *Easter* then next. *Bro. Vad. Mt. 6.* 3
Brownl. 106. Rast. Ent. 8.

That the defendant was indebted to the plaintiff in 20 l. for the rent of a farm, for which the plaintiff had distrained seven geldings; whereupon the defendant, in consideration that the plaintiff would release the seven geldings, promised to re-deliver the geldings, or pay the said 20 l. *Re. Dec. 73.*

P *461. *In consideration that the plaintiff had delivered the defendant a horse by way of exchange, the defendant promised to pay 10s. and deliver him a colt to such a vaule. *Cl. Aff. 199.*

Where the defendant promised to deliver money to one J. J. which the plaintiff had delivered to the defendant. *Cl. Aff. 209.*

For that the defendant had withheld, and not delivered to the plaintiff evidences delivered to him to keep *Cl. Aff. 212.*

For not re-delivering money delivered to the defendant's wife. *Cl. Aff. 273.*

That the defendant in consideration of a price agreed upon, promised to deliver the plaintiff all the fowls which the defendant should buy after that time and before *Shrove-Tide*. *Clift 89.* The like for 80 pounds of stone-pruens. *Clift 89.*

Against the master of a ship, who had not delivered part of the goods put on board according to a bill of loading. *Ash 50.*

Where a discourse was had between the plaintiff and defendant, for lending the defendant money upon a mortgage; and the defendant in consideration that the plaintiff would deliver to C. such goods, the plaintiff promised to accept the same in part of payment, or deliver them back again. *Ra. Ent. 3.*

Upon Promises relating to the giving a Day of Payment.

Where the lord of a manor had imposed a fine of 20 l. for admittance, in consideration that the plaintiff would give the defendant time till the next court, he promised to pay, *Ec. 1 Brown. 9.*

Where the defendant was indebted to the plaintiff in 56 l. for money received by the defendant to the plaintiff's use, in consideration he would forbear till such a day, the defendant promised to pay, *Ec. 1 Brown. 75.*

The like where the money was laid out by the plaintiff for the defendant. *1 Brown. 75. Ro. Ent. 100.*

The like where the defendant was indebted for goods sold and delivered. *Ro. Ent. 101.*

The like where the plaintiff's grandfather had given him a legacy, which was to continue in the defendant's hands till he came of age, and he to pay the plaintiff interest in the mean time; and when he came of age, in consideration of giving a day of payment, the defendant promised to pay, *Ec. Bro. Red. 15,*

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Vide Title Executors.

The like Administrators.

Against an husband and wife administratrix, where the intestate was bound to the plaintiff upon a bond, and the plaintiff in order to recover the debt, intended to put the bond in suit, whereof the wife while sole had notice; and in consideration thereof, and that the plaintiff would forbear the suit, she promised to pay the costs immediately, and the debt within a reasonable time. *Vid. Rob. Ent. 105.*

Where T. gave several legacies to the plaintiff's children, who intended to sue the plaintiff for the same as executor, whereof the defendant had notice; and the defendant undertook to procure his children to forbear suing him till such a feast, promised to pay the plaintiff to the use of his children, the several legacies at that feast. *Brown. 71.*

Upon Promises relating to Forbearance of Suits.

Where the plaintiff had let the defendant a horse to ride a journey, and the plaintiff had sued him for misusing his horse; in consideration that the plaintiff would write to his attorney to desist in the suit, the defendant promised to pay the plaintiff 10l. and to pay the attorney's bill. *1 Brown. 20.*

In consideration that the plaintiff being the master of the court of wards, and the defendant having a suit against him then depending in that court, would get the suit dismissed, the defendant promised to secure 40l. a year upon the plaintiff, during the life of the defendant's wife, and pay him 100l. upon the dissolution. *1 Brown. 51.*

Where the defendant was indebted to the plaintiff in 10l. and the plaintiff intended to sue for the same; in consideration that the plaintiff would not prosecute the suit, the defendant promised to pay the plaintiff the 4th part of the debt, and to become bound for the residue. *1 Brown. 52.*

Where the defendant, who was administratrix to her husband, who was indebted to the plaintiff in 40s. and the plaintiff had paid money due upon a bond wherein the defendant's husband was bound with him, whereof the defendant had notice; in *consideration P *462. that the plaintiff would not prosecute the defendant as administratrix, &c. but would stay two months, the defendant promised to pay, &c. *1 Brown. 53.*

Where there was a controversy between the plaintiff and defendant in the spiritual court, about repairs of a chancel, wherein sentence had been pronounced for the defendant against the plaintiff; and he intending to appeal to the court of arches, in consideration that

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that the plaintiff would not prosecute the appeal, the defendant promised to pay the plaintiff 40s. *2 Brown. 4.*

Where the defendant was indebted to the plaintiff in 100l. and he intended to sue the defendant for the same, and had given him such notice; in consideration that the plaintiff would not sue him till his return from G. the defendant promised to pay, *Exc. Tho. 24.*

Where the defendant, in consideration the plaintiff would cause a trial at the assizes to be stopped, and would not any further proceed, the defendant promised to pay, *Exc. 60l.* for the costs of the suit in a fortnight. *Han. 51.*

Upon Promises of Forbearance of a Suit against a third Person.

Where the plaintiff had recovered a judgment in the common pleas against R. and W. upon an agreement, and intended to sue them upon that judgment; the defendant in consideration that the plaintiff would not prosecute them any further, promised to pay the plaintiff the debt at such a day, and the costs at another day. *Han. 33.*

In consideration that the plaintiff would not prosecute a suit against the defendant's son, the defendant promised to pay the debt. *Pl. Gen. 54.*

In consideration that the plaintiff would desist from prosecuting the defendant's brother for 12l. residue of a greater sum, the defendant promised to pay, *Exc. Re. Dec. 43.*

The like for the debt of a stranger. *Ibm. 45.*

In consideration of withdrawing a suit in the court of admiralty against G. J. and L. G. being the defendant's creditors, he promised to pay the plaintiff. *Cl. Aff. 89.*

In consideration that the plaintiff let one T. S. out of prison, where he was detained at the plaintiff's suit, the defendant promised to pay, *Exc. Bro. Red. 87. Cl. Aff. 265.*

Where the defendant, in consideration that the plaintiff would forbear a suit in an ejectment, promised to deliver possession within a month, and pay the arrears of rent. *Re. Dec. 16.*

In consideration that the plaintiff would discharge the defendant out of prison, who was there at the suit of the plaintiff, the defendant promised to pay, *Exc. Cl. Aff. 265.*

In consideration that the plaintiff would not prosecute the defendant in an action of trespass, the defendant promised to pay, *Exc. Cl. Man. 124.*

Against husband and wife, where the wife, while she was sole, was indebted to the plaintiff in 35l. for the recovery whereof the plaintiff intended to prosecute the defendant; and the defendant in consideration that the plaintiff would not prosecute his intended suit, promised to pay 5l. *per Ann. till 35l. was fully paid. Mo. Int. 24.*

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Special Promises for the Payment of Money for a third Person.

In Consideration that the plaintiff being the lord of the manor, would admit *E.* tenant of customary lands held of his manor, the defendant promised to pay 25*l.* for the fine assessed, for the admission, at such a day. *Ro. Ent. 25.*

That *R.* the defendant's son was indebted to the plaintiff in 300*l.* and the plaintiff had paid for *R.* 20*l.* part of a debt due upon a bond, wherein the plaintiff was bound for *R.* upon a discourse had between the plaintiff and the defendant; in consideration that the plaintiff would shew the defendant the said bond, the defendant undertook to pay such monies upon demand, as *R.* then owed the plaintiff. *1 Bro. 13.*

In consideration that the plaintiff would lend *J.* and *A.* 20*l.* for six months, the defendant promised to pay the same with interest upon demand after the end of the six months, if *J.* and *A.* did not. *1 Bro. 31.*

In consideration that the plaintiff had sold to *E.* the defendant's daughter divers goods, wares, &c. and had laid out monies for the said *E.* in the whole amounting to 7*l.* the defendant promised to pay the same upon demand. *1 Bro. 47.*

The like promise for clothes sold to the defendant's son at his request. *Mo. Int. 22.*

**Promises relating to Meat and Drink provided for a third Person. P *463.*

That in consideration that the plaintiff would provide meat, drink, lodging and firing for such persons as the defendant should bring, the defendant promised to pay so much for meat and drink, so much for lodging, and so much for fire. *3 Brownl. 4.*

In consideration that if the plaintiff would receive in his house the defendant's son, and would instruct him in musick, and find him other necessaries, the defendant promised to pay the plaintiff for the keeping and schooling of his son, and for necessaries. *Hen. 166.*

The like for a daughter. *Rob. Ent. 13.*

In consideration that the plaintiff would permit one *J.* to be a boarder till such a time, the defendant promised to pay the plaintiff 8*l.* and a *quantum meruit* for the same, *1 Brown. 68.*

In consideration that the plaintiff would procure the defendant's bastard to be dieted and nursed, the defendant promised to pay so much as it was worth; and another promise in consideration that the plaintiff had procured the defendant's bastard to be nursed for the

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space of 112 weeks, at the rate of 2s. per week, amounting to 11l. 4s. the defendant promised to pay, *Et c.* 1 *Brown.* 82.

In consideration that the plaintiff as tutor in a college, had undertaken the care and tuition of the defendant's son, and laid out for him 91l. that the defendant promised to pay the plaintiff the money laid out, and for the tuition as much as it is worth. *Vid.* 12 *Hern* 233.

Promises relating to Meat and Drink, and other Necessaries provided for the Defendant himself.

In consideration that the plaintiff would provide for the defendant, who was then sheriff of the county of G. meat, drink, wine, and other necessaries, for the time of the assizes, the defendant promised to pay so much money for the same, as one *W.* had paid, when he was sheriff. *Han.* 49.

The plaintiff being the keeper of the county gaol of G. the defendant being a prisoner there, in consideration that the plaintiff would provide the defendant sufficient meat, drink, and lodging, the defendant promised to pay as much as it was worth. 1 *Brown.* 10.

The like by the keeper of the gate-house upon a promise to pay 21s. a week, to wit, 12d. for dinner, 12d. for supper, and 12d. for a bed every night. *Bro. Red.* 30. 1 *Brown.* 219.

Upon an *indebitatus assumpsit*, for a hoghead of white-wine, and another *indebitatus* for meat and drink for the defendant, and provender for his horse, and a *quantum meruit* for the same, and an *insimul computasset*. 2 *Vent.* 279. *Cl. Man.* 62, 95.

For meat, drink and lodging for the defendant and his friends. *Re. Decl.* 38.

Upon several *assumpsits* for victuals. *Rob. Ent.* 41.

Promises relating to Marriages.

Upon an agreement made between the plaintiff and the defendant, upon a marriage to be had between the plaintiff's son, and the defendant's daughter; in consideration that the plaintiff had undertaken to perform the agreement on his part, the defendant promised to pay the marriage portion at several days, and a demurrer thereto. *Wi. Ent.* 93.

In consideration that the plaintiff had before that time married the daughter of the defendant, he undertook to pay the plaintiff 6l. 13s. 4d. within two years then next following. 1 *Bro.* 47.

In consideration that the plaintiff would marry *A.* a friend of the defendant's, he undertook to pay 10l. and defray the charges of the wedding dinner. *Bro. V. M.*

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Against the brother of the deceased who owed the plaintiff 40l. to be paid on the day of marriage or day of death; another promise upon a discourse between the plaintiff and the defendant, if the plaintiff would prove the death by the oath of witnesses, which he did. *Red. Decl.* 54.

In consideration that the plaintiff would marry one of the defendant's daughters, he promised to pay the plaintiff 20l. upon the day of marriage, and to give the plaintiff as much money, beside the 20l. as he gave with any other of his daughters in marriage, with an averment, that he gave one of his daughters 110l. for her marriage portion. *Tho.* 20. *Han.* 12.

Upon mutual promises of marriage between the plaintiff and defendant. 2 *Mod. Int.* 107. *Vid.* 12.

*In consideration that the plaintiff would marry a daughter of the P *464. defendant, he promised to pay the plaintiff 120l. and to give her two suits of clothes at the day of marriage. *Rob. Ent.* 39. *Bro. Vad. Me.* 41.

The like upon a promise by the defendant, to pay the plaintiff 100l. marks. *Bro. Red.* 24.

The like to pay the plaintiff goods and money to the value of 100l. *Han.* 42, 43.

The like to marry the defendant's sister. *Cl. Aff.* 271.

The like to marry the defendant's cousin. *Rob. Ent.* 105. *Cl. Man.* 145.

Upon a discourse of marriage then to be had between the plaintiff and E. in consideration of 12s. paid by the defendant to the plaintiff; the plaintiff promised to pay the defendant 20s. on the day of marriage. *Bro. Vad. Me.* 10.

In consideration that the plaintiff would expedite a proposal of marriage between him and M. the defendant's daughter a widow, and one L. the defendant promised, that if the portion of M. should by an inventory exhibited be less than 1000l. the defendant promised to make it 1000l. *Rob. Ent.* 52. *Hern.* 191. *in English.*

Where the plaintiff was seised of copyhold lands, that in consideration the plaintiff would marry his daughter, the plaintiff promised him an estate therein, and to surrender the tenements to the use of the plaintiff for life. 3 *Brown.* 48. *in English.*

In consideration that the plaintiff would permit the defendant's son to marry the plaintiff's daughter, and that the plaintiff would surrender copyhold lands to their use, the defendant promised to pay the plaintiff 10l. *Ash* 19.

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Upon Promises relating to Feeding of Cattle.

In consideration that the plaintiff would depasture a colt for the defendant, the defendant promised to pay as much as it was worth. *Tho.* 15.

In consideration that the plaintiff would depasture ten steers for the defendant for the space of five weeks, the defendant promised to pay the plaintiff 30s. and in consideration that the plaintiff would depasture for the defendant other steers for so long time, the defendant promised to pay as much as it was worth. *Han.* 37.

Upon an *in simul computasset* for the depasturing of sheep. *Mo. Int.* 12.

For an executor against an executor of an executor, for depasturing cattle by the plaintiff's testator, for the defendant's testator, a *quantum meruit* for the same; the like for hay fold. 1 *Brown.* 20.

That the defendant on selling sheep to the plaintiff, then in custody of *E. D.* to feed, promised to pay *E. D.* for the feeding, and to discharge the plaintiff therefrom, which he had not done. *Cl. Aff. Clift.* 65, 66, 67.

For the plaintiff's feeding of lambs till such a feast, which he had sold to the defendant. *Cl. Aff.* 230.

Other *assumpsits* for feeding cattle. *Cl. Man.* 152. *Cl. Aff.* 270.

That in consideration that the plaintiff would receive into his inn in London, two geldings of the defendant to be kept in a stable with oats, hay, and other necessities, the defendant promised to pay *quantum valeret*, and one gelding was kept there for 18 days, and the other 120 days. 3 *Brown.* 47.

In consideration that the plaintiff would depasture for the defendant, the defendant promised to pay as much as it was worth, and another *indebitatus assumpsit*, and a *quantum valeret* for feeding cows all the winter. 3 *Brown.* 55.

For Curing Diseases.

An *indebitatus assumpsit*, and *quantum meruit* for curing the defendant of a broken leg. *Vid.* 5 *Mo. Int.* 5. *Cl. Man.* 59.

An *indebitatus assumpsit* for work and labour, employed in curing the defendant, and for providing and administering medicines by a doctor of physick, and a *quantum meruit* for the same. *Vid.* 52.

Against an executor upon a promise of the testator to pay 20l. for curing of a disease called a rupture, whereof 15l. had been paid. *Bro. Red.* 35. 1 *Brown.* 231.

The like of a disease called the king's evil. *Cl. Man.* 130.

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For a surgeon retained, to cure a disease called a running of the reins, for 40s. to be paid upon the cure, and the defendant refused to use the plaisters and physick prepared for him, or to pay the plaintiff for the same. *Bro. Red. 45. 1 Brown. 251.*

A *quantum meruit* for curing the defendant's horse of the staggers. *Ro. Ent. 32.*

*An *assumpsit* to pay the plaintiff 20l. in hand, and after the cure performed 30l. in consideration the plaintiff would cure the defendant's daughter of a broken thigh. 3 *Brown. 43. Hern 249.* P *465.

By an apothecary for administering medicines to a third person. *Lill. Ent. 24, 36.*

By a doctor of physick. *Lill. 25.*

By a physician for curing the defendant's wife of a lunacy. *Lill. Ent. 25.*

An *indebitatus assumpsit* for a surgeon's salary in a voyage, and a *quantum meruit* for the same. *Vid. 51.*

The like for other cures performed by a surgeon. *Cl. Man. 59. Re. Dec. 52. 2 Inst. Cl. 141. 142.*

Upon Promises relating to Awards.

Where the plaintiff and defendant had submitted themselves to an award concerning trespasses, and the defendant, in consideration of the submission, and of six pence paid, and of the plaintiff's promise to perform the award, the defendant promised, that if he did not perform the award, he would pay the plaintiff 20l. 2 *Brown. 25. Bro. Red. 41, 80.*

The like upon a trespass and assault. *Han. 13.* The like upon several other controversies. *Bro. Red. 41, 11. 1 Saund. 28.* The like of all actions and suits, &c. *Tho. 19.*

Where the plaintiff and defendant submitted themselves to an award, concerning several debts, demands and accounts, which were between the plaintiff and defendant, and two others; and if the arbitrators should not make the award before such a feast, that then they would stand to the award of an umpire; and in consideration of six pence paid, and of the plaintiff's promise to perform the award, the defendant promised, and that if he did perform the award, he would pay the plaintiff 100l. the umpire made an award which the defendant had not performed. *Wi. Ent. 470. Co. Ent. 3. 1 Brownl. 243.*

Where there were controversies between the plaintiff and defendant, who had submitted themselves to an award and in consideration that the plaintiff would cease all his suits, the defendant undertook to pay the plaintiff 20l. if the controversies were not determined by arbitrators. *Ro. Ent. 101.*

Where

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Where the plaintiff and defendant submitted themselves to an award of an arbitrator of matters in litigation depending between them ; and in consideration that the plaintiff had undertaken to perform the award on his part, the defendant undertook to perform the award on his part, which he had not done. *Bro. Red.* 113.

Upon an award of several matters in difference, that the defendant should pay 40l. upon request, if he should not stand to the award of *F. B.* but doth not aver any request ; therefore held ill. *1 Saund.* 28.

Upon a reference to an arbitrator, upon a discourse concerning exchanging of horses. *2 Mo. Int.* 51. *Clift* 72.

Promises upon Wagers.

In consideration of 5s. deposited by the plaintiff to the use of the defendant in the cockpit, where two cocks were fighting, the defendant undertook to pay the plaintiff 10l. if such a cock beat such a cock in the battle. *Wi. Ent.* 98.

Upon a wager concerning weighing of cloth. *Wi. Ent.* 110.

Where the plaintiff delivered to the defendant being the bailiff of a hundred, a warrant and money, to attach the goods of *M.* upon a plaint in the hundred court ; and the defendant in consideration of two-pence, undertook to pay the plaintiff 10l. if the shop-door of *M.* was not shut in such a manner, that he could not execute his warrant. *2 Brown.* 1.

Upon a discourse between the plaintiff and defendant, about the plaintiff's performing a journey on foot ; in consideration that the plaintiff would deliver to *W.* 80s. to the use of the defendant, if the plaintiff should not perform the journey from his own house to *M.* in such a day, the defendant undertook to pay the plaintiff 19l. 15s. upon his return, if he did perform it. *Ro. Ent.* 39.

An *assumpsit* for money lost on a shooting match. *Ro. Ent.* 63. *Hern* 276.

The like upon a horse-race. *2 Mod. Int.* 49. *Hern* 176.

In consideration that the plaintiff had undertaken to carry seven quarters of barley in a cart with five horses, from the top to the bottom of a hill before such a day, or in default thereof, to pay the plaintiff 8l. the defendant paid the plaintiff 2s. 6d. and undertook to make it up 8l. if the plaintiff did carry, &c. *Bro. Red.* 29.

P* 466. •Upon a wager, if such a city should be in the hands of the duke of *Saxby* before such a day. *Bro. Met.* 2.

In consideration that the plaintiff had undertaken to pay the defendant such sums which he should get at a play called *hazard*, the defendant undertook to pay the plaintiff such sums as he should get at the same play, and the plaintiff got 30l. which the defendant had not paid. *Bro. Met.* 292. *Ven.* 175.

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Upon a wager at wrestling. *Hen.* 79.

Upon a wager concerning ejecting the plaintiff out of lands.
Browl. 62.

Assumpsit upon Issues directed by the Court of Chancery.

By way of wager, that the payment of monies at *Haberdashers-Hall*, was good payment, within the intent of the act of oblivion, with an averment, that it was a good payment, and a demurrer thereupon. *2 Saund.* 277. *Han.* 130.

Upon three feigned issues out of chancery to try the value of a personal estate, and two manors. *2 Mo. Int.* 68.

Upon an issue directed out of the court of chancery to try a title at common law, concerning a liberty of a *Fold-Course*. *Ro. Ent.* 48.

Upon an issue directed out of the court of the *Dutchy of Lancaster*, to be tried at the king's bench, concerning lead-mines belonging to a manor within that *Dutchy*. *Bro. Red.* 114.

Upon an issue out of chancery to be tried, whether it was agreed between him and the plaintiff in making a bond, that *E.* should not pay more than 5*l.* if the condition of the bond should not be performed. *2 Brown.* 8.

A declaration in a feigned action, directed out of chancery, to settle a difference in partnership. *Lilly* 45, 48, 66.

Another against an executor and *donee*, concerning exchequer-tallies. *Lilly* 65.

DECLARATIONS ON PROMISSORY NOTES, AND BILLS OF EXCHANGE.

On Promissory Notes.

Upon an *assumpsit* against the master, on a promissory note drawn by the servant. *Lill. Ent.* 43.

By assignees of two bankrupts, on notes given by the defendant's servant for the defendant, payable to the bankrupts. *Lill. Ent.* 41.

Against executors on a promissory note indorsed to the plaintiff. *Lill. Ent.* 44.

On a promissory note given by one partner, on the behalf of the other. *Lill. Ent.* 48.

By the indorsee of an indorsee of a promissory note brought against the drawer. *Lill. Ent.* 73.

On a promissory note against the indorser. *Lill. Ent.* 54.

By an assignee of a promissory note against executors. *Lill. Ent.* 45.

Against

Upon

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Against the drawer upon a goldsmith's note, payable to one or bearer. 3 *Lev. Rep.* 296. *Clift* 913.

Upon note given by the goldsmith's servant. *Clift* 914, 916.

On Bills of Exchange.

Against the drawer in *England* upon the custom, where the defendant made a bill of exchange, directed to a merchant at *Amsterdam*, for payment of money at two usances and an half, who had not paid it; whereby the bill was protested according to the custom of merchants. *Vid.* 31, 34, 66, 67.

The like against the drawer on an inland bill. *Clift* 911, 924.

A declaration upon a bill of exchange against the drawer, setting forth, that the plaintiff had paid the bill for the honour of the indorser; in which it is alledged, that two bills of the same effect were drawn, and the first accepted, but afterwards was protested for non-payment, and judgment in the king's bench. But it was afterwards reversed in the exchequer, because that the custom was too general. *Lut.* 892.

Upon two bills of exchange, where the plaintiff, paid 45*l.* current *English* money at *Islington* to the defendant, who thereupon drew two bills of exchange upon one C. his factor then residing at *Venice*, appointing him to pay 200 ducats *Venice* money to the plaintiff, upon two days sight, which was not performed, either by the factor at *Venice*, or the defendant afterwards in *England*. *Bro. Vad.* 19.

Against the drawer of a foreign bill of exchange, by the person to whom the same was payable. *Lill. Ent.* 55. *Clift* 921, 924. *Vid.* 67. *Tho.* 41.

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* Against the Acceptor.

Upon the custom of merchants, where W. directed the bill to the defendant, to pay the plaintiff 90*l.* within three days after sight, which bill the defendant accepted, and promised to pay. *Vid.* 17. 2 *Mod. Int.* 121. *Bro. Met.* 27.

The like upon the custom of merchants and others used in *London*. *Bro. Met.* 27. *Cl. Aff.* 236. 2 *Mo. Int.* 112. *Cl.* 913. *Clift.* 918, 920.

The like where the plaintiff declared upon a custom used between merchants at A. and merchants at *London*, upon a foreign bill directed to the defendant, for the payment of money at two usances to the merchant at *London*, or his order, which the defendant accepted. *Vid.* 30. *Bro. Red.* 77. *Bro. V. M.* 12. 2. *Mod. Int.* 124. *Cl.* 896, 897.

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The like upon the custom of the city of *Bristol*, on a bill, payable to the party, or to his order. *Clift* 899.

The like upon a bill of exchange from *Dublin* in *Ireland*, to pay money at twenty-one days after sight, which the defendant accepted, and promised to pay. *Vid.* 33. *Bro. Va. Me.* 14.

By an indorsee against the acceptor. *Clift* 923.

The like where the defendant refused to accept the bill whereby it was protested. *Vid.* 69. *Cl. Man.* 140. *Clift* 963.

Where the plaintiff by his factor had delivered to the defendant's factor 1000 ducats *Venice* money, who gave him a bill, directed to the defendant to pay at three usances, viz. at the end of three months, according to the rate of *English* money; and the defendant afterwards accepted the bill, and promised to pay the money. *Vid.* 70.

Where the defendant had accepted a foreign bill, and had not paid it. *Bro. Red.* 75. *Cl.* 893, 897.

The like where the defendant had accepted the bill, and had paid part, and promised to pay the remainder. *Bro. Red.* 76. *Clift* 922.

Upon a bill of exchange against the acceptor, which had accepted to pay the money by a bank bill, and not otherwise; and a breach assigned, that the defendant delivered a bank-bill to the plaintiff, in which the defendant had no interest; on a verdict on *non assumpsit*, and several exceptions, judgment for the plaintiff. *Lut.* 277. 1 *Ven.* 64.

Against the acceptors of a foreign bill of exchange, payable at two usances and an half. *Lill. Ent.* 90.

Upon a bill drawn by a merchant at *Venice*, upon a merchant at *London*, where the custom is alledged to be, that if the second indorser pays the bill to the second indorsee, that then the second indorser shall have an action against him, to whom the bill was directed, and had accepted, and had not paid it, in which declaration the usances are alledged to be three months. *Lut.* 885.

A declaration upon a bill of exchange against the acceptor, setting forth, that a bill of exchange was directed to the defendant to pay the plaintiff ten pounds within ten days after sight, and the original was sued out the 10th day, accounting the day of sight for one; and yet judgment was given for the plaintiff. 2 *Lut.* 1589.

Upon a bill of exchange directed by a merchant of *Lisbon* in *Spain*, to the defendant, desiring him to pay 115l. 17s. 6d. to the plaintiff, which bill the defendant accepted, yet afterwards refused to pay the money to the plaintiff; in which action the customs of *London* and *Lisbon*, used among merchants touching bills of exchange, are set forth. *Bro. Vad.* 14.

The like upon two bills of exchange, directed to the defendant by his factor, desiring him to pay 72l. sterling to the plaintiff in *London*, in consideration of 107l. 6s. 8d. *Flanders* money received at

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at *Antwerp* of the plaintiff's factor for the defendant's use, *Bro. Va. Me.* 16.

The like upon two bills of exchange, directed to the defendant in *London* by his factor, &c. which money the defendant refused to pay, notwithstanding his acceptance of the said bills. *Bro. Ba.* 18.

Upon a bill of exchange against the acceptor, and a demurrer to the declaration, and a good exception taken, viz. *That the acceptor is to pay the bill according to his acceptance, and the bill doth not mention any time; nor is it alledged, that the defendant had accepted to pay the bill immediately, or at any time certain.* *Lut.* 231.

Against the defendant and his partner, (who was outlawed) upon three bills of exchange, payable at double usance to the plaintiff or bearer, (the second and third not being paid) for 150*l.* sterling, &c. and that the defendant accepted the first bill, and subscribed it with his own hand. *Bro. Vad. Me.* 12.

P *468. *Against him who undertakes for the Honour of the Drawer, Acceptor or Indorfor.

Upon two bills of exchange, the defendant promised, that if *W.* would not accept the said bills, or one of them, nor pay, &c. that then the plaintiff would upon request, with an averment of refusal to accept; whereupon the plaintiff protested, and gave the defendant notice; and the plaintiff lays special damage for not receiving his money at the time mentioned. *Bro. Vad. Me.* 22, 23.

The defendant made a bill, and promised to pay to one *G. M.* or bearer 44*l.* for value received, and appointed the payment of the bill to the plaintiff; That the defendant had notice, and promised to pay, if the plaintiff would not return the bill. (2.) Whereas the plaintiff at the instance of the defendant had paid to *G. 44l.* for value received, the defendant undertook to pay, &c. (3.) *General Count* upon the same bill drawn by the defendant; whereby according to the custom of merchants, the defendant was liable to pay. *Clift* 929.

A declaration upon a bill of exchange drawn by a merchant at *Leghorn*, upon a merchant at *London*; wherein the custom is set forth, that if any merchant, &c. (for the honour of him to whom the bill was at first payable, and had indorsed it to another) shall pay the bill to the last indorsee, the bill being before protested for non payment) then the merchant to whom the bill was at first payable, and who first indorsed it, shall have an action against that merchant, who at first took upon him to write upon the bill to pay the same, for the honour of the drawer (the bill being before protested) for the value of the bill, and all charges, &c. Judgment for the plaintiff affirmed upon a writ of error. *Lut.* 896.

On a promissory note against the indorfor. *Lill. Ent.* 43, 54.

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By and against the Endorser.

Where the second indorsee brought an action against the drawer, and had judgment; and after that, and before execution, he brought an action against the first endorser; and it was adjudged upon a writ of error, that the action would lie. 1 *Lut.* 878.

By the Endorsee.

By an assignee upon the custom of merchants upon three several notes. 2 *Mo. Int.* 126. *Clift* 893.

By an assignee against a company of merchants upon a foreign bill. 2 *Mo. Int.* 128.

By an assignee against the drawer of an inland bill of exchange. *Lill. Ent.* 44.

By the endorsee of a promissory note against executors. *Lill. Ent.* 45.

By the endorsee of an endorsee of a promissory note against the drawer. *Lill. Ent.* 73.

By assignees of two bankrupts, on notes given by the defendant's servant for the defendant, payable to the bankrupts. *Lill. Ent.* 41.

DECLARATIONS UPON OTHER PROMISES RELATING TO MERCHANTS.

An action founded upon a bill of lading against the master of a ship, wherein the plaintiff had put on board diverse wares, &c. at L. beyond sea, to be carried directly to the city of London, which the defendant promised to do for the freight, and to deliver the goods in good condition. But for want of due care, the defendant had spoiled the goods. *Clift* 37.

That the defendant in consideration of 3 l. 12 s. by a policy of assurance, undertook to assure the plaintiff's ship, tackle and furniture, to the value of 100 l. *Vid.* 26. 2 *Saund.* 200. 2 *Mo. Int.* 59.

The like of goods. *Vid.* 48. *Cl. Aff.* 224. *Bro. Vad. Me.* 27. *Bro. Met.* 39, 44.

Against the assureds upon a policy of assurance. *Clift* 77.

Where there was a discourse between the plaintiff and the defendant concerning a ship and the cargo thereof; and it was agreed between the parties, that the defendant should have the ship to his own use, and should pay the plaintiff all sums of money as he had laid

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laid out about her, and the plaintiff should have all the goods which he had bought in the voyage to his own use; and both parties reciprocally promised to perform the agreement, which the defendant had not done. 3 *Lev. Rep.* 315.

P *469. That the defendant offered to sell a sixth part of a ship, and it was agreed that the defendant should sell all his interest, &c. to the plaintiff, *and that the sale should be in writing; whereupon the plaintiff should pay 600 l. and so more or less according to that rate; and the plaintiff paid 20 l. before-hand, and the action brought for the 20 l. the agreement never having been reduced into writing. 3 *Lev. Rep.* 316.

Upon a special agreement, in consideration that the plaintiff would buy and sell wares and merchandizes for the defendant beyond sea, the defendant promised to accept, and pay any bill of exchange drawn upon him by the plaintiff, so that the money did not exceed the sum laid out by the plaintiff; and the defendant did not accept several bills, but they were protested; and an *indeb. ass.* for 8072 l. 7 s. 2 d. and a *quantum valebant* for goods sold and delivered, and a *quantum meruit* for work and labour. *Cli.* 903, 904.

In consideration that the plaintiff would retain the defendant for their factor to sell slaves, and divers commodities at *Virginia*; the defendant promised to give a just account of the profits of the voyage. *Bro. Va. Me.* 70.

An *indebitatus assumpsit* for the hire of a boy; and a second count, that in consideration that the plaintiff had lent to the defendant a hoy for the hire of 30 s. that the defendant promised to pay, &c. a third. That in consideration the plaintiff had lent the defendant a hoy, the defendant promised to pay so much as it was worth. *Cli.* 908.

Against a master of a vessel by an executor, for wages for the service of her husband's apprentice in a voyage to the *East-Indies*. *Lilly's Ent.* 33.

By a master of a vessel for freight only. *Lilly's Ent.* 54.

By the master of a vessel for freight and average. *Lill. Ent.* 33.

By executors against a master of a vessel for goods transported by him from *Guinea* to *London*. *Lill. Ent.* 26.

Against a partner of a ship for repairs, and for the master's salary. *Re. Dec.* 56.

In consideration that the plaintiff would permit J. his apprentice to go a voyage as a shipwright with the defendant being master of the ship, the defendant undertook to pay the plaintiff 38 s. for every month, and bring back the said J. at the end of the voyage. *Br. Red.* 41.

A declaration for a salary in piloting a ship, and a *quantum meruit* for the same. *Cli.* 911, 912.

For work and labour, in buying and sending over merchandizes beyond sea. *Cli.* 906.

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Upon Promises relating to Stocks.

On a special agreement in writing to transfer stock in the bank of England. *Lew. Ent.* 27.

Upon a special contract to deliver 300 l. third subscription *South-Sea* stock to the plaintiff. *Lill. Ent.* 85.

Another by an executrix for not transferring *South-Sea* stock. *Lill. Ent.* 42.

Upon By-Laws.

Upon an ordinance or by-law of the company of cooks in London, for refusing to take the livery. *Clift* 901.

Upon a by-law of the *felt-makers*, for setting up as a master-workman before he had made three hats or felts, and offered them to the view of the company, pursuant to their by-law. *Clift* 901.

The like by the *felt-makers* for taking two apprentices contrary to one of their by-laws. *Clift* 902.

Promises relating to Lands.

The plaintiff being a customary tenant, with others for lives successively, where the custom of a manor was, that the first person named in the copy should surrender to his own use, and to the use of two others named by him; in consideration that the plaintiff for 12 d. in hand paid, and 50 quarters of salt to be delivered, had undertaken to surrender the customary lands to the use of himself, and two others named by the defendant, and had procured a court, &c. The defendant promised to appear at the court, and accept the estate, and deliver the salt at such a time. That the plaintiff had procured a court, but the defendant did not appear. *Wi. Ent.* 65.

In consideration that the plaintiff would surrender customary lands to the use of the defendant and his heirs, the defendant undertook to pay the plaintiff 20 l. within a month after the surrender. *Brown.* 54. 2 *Brown.* 4.

In consideration that the plaintiff would procure J. S. his son to make an assurance to the defendant, of certain customary lands, and would discharge the defendant from an agreement made between them, the defendant promised to pay the plaintiff 100 s. 2 *Brown.* 4.

Where the defendant sold customary lands, and had undertaken to make the plaintiff a sufficient surrender *therein within such a P *470.
time. *Pl. Gen.* 16.

Where

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Where the plaintiff bought lands of the defendant, and the defendant promised him to make a sufficient estate therein, within such a time. *Bi rown* 29.

Where the plaintiff sold lands to the defendant for 200 l. and in consideration that the plaintiff undertook to make him an assurance thereof, to be devised by the defendant, the defendant promised to pay him 100 l. at the time of sealing the conveyance, and another 100 l. at such a feast, and to give him a horse of 11 l. value in part of payment. *Bro. Red.* 24.

Where the defendant, in consideration of money paid, and annually to be paid upon an assurance, promised to make the plaintiff a good and legal conveyance of the lands in fee. *Rob. Ent.* 72.

In consideration that the plaintiff had demised to the defendant part of his house, the defendant promised to give the plaintiff a quarter's warning, or otherwise to give 5 l. upon demand. *Cl. Man.* 126,

Where the defendant demised to the plaintiff a manor which he could not have demised. *Cl. Aff.* 209.

Where the defendant agreed to sell the plaintiff an house, and undertook to keep the plaintiff indemnified in pulling down, and laying to the ground the house, and one *R. A.* brought an action of trespass. *Clift* 44.

Where there was a discourse had between the plaintiff and defendant concerning a demise; whereupon several agreements were made, which the defendant had not performed. *Tho.* 23. 2 *Brown.* 2.

Where the defendant promised that he would not assign, and would lay the dung upon the premises, and broke his contract. *Clift* 43. 47.

In consideration that the plaintiff had surrendered a shop to the defendant, the defendant undertook to put the plaintiff into quiet possession into another shop of his, or to pay the plaintiff 20 l. 1 *Brown.* 25.

That in consideration that the plaintiff would assign a messuage, and his estate and interest therein to the defendant, he promised to pay 450 l. *Clift* 46.

In consideration that the defendant had received the profits of lands belonging to the defendant and his sisters, and had never delivered them an account, he promised to pay the plaintiff 40 l. as a recompence for his part. 1 *Brown.* 55.

Upon a discourse, the defendant agreed to make the plaintiff a lease for years under such a rent; and in consideration thereof, and that the plaintiff would accept the lease, and pay the rent, the defendant paid the plaintiff sixpence in part, and promised to make a lease at such a feast, or to pay so much money as would make that sixpence ten pounds. *Han.* 55.

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The defendant sold a term in lands to the plaintiff for money paid in hand, and the rest to be paid; and the defendant in consideration thereof, undertook and warranted the premises, containing three hundred acres to be of the yearly value of 4 l. *per acre*, whereas the premises were not of such a value. *Rob. Ent.* 33.

In consideration that the plaintiff would accept of a demise of the defendant of a messuage out of repair under such a rent, the defendant undertook to repair the messuage within eight months. *Rob. Ent.* 10.

In consideration that the plaintiff being the proprietor of a rectory, would demise to the defendant a messuage, and lands discharged from the payment of tithes, the defendant undertook to repair the messuage during the term; and at the end of the term to leave it in good repair. *Wi. Ent.* 73, 93.

In consideration that the plaintiff would permit the defendant to hold lands for three years, the defendant undertook to pay 3 s. 6 d. yearly, besides the yearly rent. *1 Brown.* 81.

Where the defendant was possessed of lands, in consideration of money paid, and of a yearly rent to be paid by the plaintiff, undertook to let lands for four years, if *A.* should live so long. *Vid.* 96. *Rob. Ent.* 109.

Where the defendant for 40 l. in hand paid by the plaintiff, undertook to demise the manor and lands to the plaintiff for the term of ten years, under an annual rent. *Pl. Gen.* 16.

The defendant claiming a title to lands in the possession of the plaintiff, which the plaintiff had tilled and sown, in consideration that the plaintiff at the instance of the defendant, would deliver up quiet possession of the lands, the defendant undertook to pay the plaintiff all the expences which the plaintiff had been at, in and about tilling the lands, without any express time of payment. *Han.* 51.

Assumpsit for rent. *Clift* 43.

An action upon the case for rent, that in consideration that the plaintiff would permit the defendant to occupy, the defendant promised to pay so much as the plaintiff deserved. *3 Lev. *Rep.* 146. *P *471.* The like. *Red. Dec.* 9. *Clift* 42, 46.

Upon a discourse to perform an agreement to pay 8 l. for building an house, but doth not aver that he built it, nor that he was hindered by the defendant; and therefore held ill. *2 Saund.* 346.

Where the defendant upon a demise of lands promised, that the plaintiff should not be ejected within the term. *Cl. Man.* 78.

For not performing an agreement as to the delivery of a messuage, and lands to the plaintiff. *Red. Decl.* 5. *Clift* 40, 41.

For not performing an agreement, as to permitting the plaintiff to enter into the defendant's lands, to bring and throw down stones there, in order to make a stone wall. *Red. Decl.* 7.

Where

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Where the plaintiff bought lands of the defendant, and the defendant undertook to enfeoff the plaintiff within such a time, which he had not done, but within that time sold them to *A.* and enfeoffed him thereof. *Rast. Ent.* 6, 685. *Vet. Int.* 48.

For an executor where the testator was possessed of tenements for a term of years, and of goods in a messuage; and upon a discourse, the defendant, in consideration that the testator had undertaken to convey the estate to the defendant, and to leave him the several lands at several times, and the houses repaired, undertook to pay the testator 500 l. *Hern* 66.

In consideration that the plaintiff demised to the defendant a close of land, to have half the corn for three years, the defendant undertook that he would yearly sow the close, and render half the corn: breach, that the defendant the first year left two acres unsown. *Hern* 94.

Where the defendant was seized of customary lands for life, sold the plaintiff his estate therein, and the cattle and goods, and undertook to cause a sufficient estate to be made to the plaintiff in the lands, and to deliver the goods. *Rast. Ent.* 7.

Upon Promises relating to Indemnity.

Where the defendant agreed to sell to the plaintiff a messuage, and to indemnify him in pulling down the house. *Clift* 44.

The defendant bought a cow of *R.* which *R.* would not deliver unless the plaintiff would promise the payment of the money at such a day. The defendant did not pay the money at the day, upon which the plaintiff was threatened to be sued, and was forced to pay the money. 1 *Brown.* 32.

The plaintiff and defendant became bound with *J.* the defendant's father for the debt of *J.* ———. In consideration that the plaintiff had sold to the defendant certain cattle at such a price, the defendant promised to indemnify the plaintiff from the debt; which was not done; by which the plaintiff was sued, and compelled to pay the debt, with costs of suit. 1 *Brown.* 40. *Rast. Ent.* 12.

The plaintiff, at the instance of the defendant, became bound with him for a sum of money, and the defendant undertook to indemnify him; which he did not do; by which the plaintiff was sued upon the bond in the common pleas, and compelled to pay 20 l. in discharge of the debt. 1 *Brown.* 68. 1 *Brownl.* 240.

The defendant was in prison upon an execution in *N.* and the defendant, in consideration that the plaintiff would become bound for the debt and damages, to discharge the defendant out of prison, he undertook to indemnify the plaintiff therefrom; which he did not do; by which the plaintiff to avoid the charges of a lawsuit, paid the money. 1 *Brown.* 74. *Cl. Ass.* 215.

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In consideration that the plaintiff consented, that the defendant should defend a suit in ejectment in the plaintiff's name, he undertook to indemnify him from all damages to be adjudged against him, and the plaintiff was taken in execution, and paid 19 l. for damages, expences, and costs, &c. *Tho.* 12.

In consideration that the plaintiff became bound with the defendant for 82 l. the defendant promised to indemnify him, which he did not, by which the plaintiff was taken upon an outlawry, and was compelled to pay the money, and several sums of money in defending the suit. *Bro. Met.* 8.

The defendant became bound to the sheriff for the appearance of the plaintiff, who did not appear, and the defendant in consideration of 50 s. in hand paid by the plaintiff, undertook to indemnify the plaintiff from the bond; which he did not do; but the sheriff sued the plaintiff, and had execution against him. *Rob. Ent.* 92. The like *Bro. R.* 39. *Red. Decl.* 59. *Clift* 79.

The defendant undertook to indemnify the plaintiff from any trouble from taking a distress. *Clift* 80.

The plaintiff was bound for the appearance of the defendant at the sessions, and the defendant undertook to indemnify the plaintiff, &c. *Cl. Aff.* 216. P *472.

E. recovered a judgment in an action of scandal, and had 47 l. damage against the plaintiff, who was prosecuting the defendant, brother of *E.* in an action of trespass; and the defendant in consideration of 16 l. paid him by the plaintiff, for the use of *E.* and that the plaintiff would not further prosecute his suit against the defendant, he undertook to indemnify the plaintiff from the damages recovered against him by *E.* which he had not done, but *E.* took the plaintiff in execution upon the said judgment. *Rob. Ent.* 106.

The plaintiff at the instance of the defendant, became bound with him for a sum of money, and the defendant promised to indemnify him, which he had not done, by which the plaintiff was arrested, and held in custody till he gave fresh security for the debt, and was compelled to pay all the costs. *Han.* 45. The like *Bro. R.* 27.

R. was indebted to *N.* in 10 l. 10 s. in consideration that the plaintiff, at the instance of the defendant, became bound with *R.* to *N.* in 20 l. for payment of the said 10 l. 10 s. the defendant promised to indemnify the plaintiff, which he had not done, by which the plaintiff was compelled to pay 13 l. in discharge of the bond. *Bro. Vad.* 4.

For that the defendant had not discharged the plaintiff from the payment to *E. D.* for the feeding of sheep, which the defendant had sold the plaintiff, &c. *Cl. Aff.* 208.

That defendant had not indemnified the plaintiff for being bail. *Id.* 215.

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Where the plaintiff at the defendant's request had become bound with him for the payment of 10 l. which not being paid at the day, the plaintiff was sued upon the bond; pending which suit, the defendant, in consideration of the premises, promised to indemnify the plaintiff; and afterwards judgment was obtained against the plaintiff, and he was obliged to pay the money. 3 *Brownl.* 71.

Where the plaintiff had become bound to the sheriff, for the appearance of one *C.* at the suit of the defendant, upon an attachment of privilege, and the sheriff was amerced for want of an appearance; and the defendant in consideration of 40 s. undertook to indemnify the plaintiff from the bail-bond. 3 *Brownl.* 103.

Where the defendant, in consideration that the plaintiff had become bound for the defendant's debt, he undertook to indemnify the plaintiff, and his goods were taken upon a *fi. fa.* *Ass.* 37.

That *R.* was arrested by a plaint in the court of the tower of *London*, and the defendant in consideration that the plaintiff would be his bail, undertook to give the plaintiff 20 l. if he should be damaged; and the plaintiff after judgment was taken in execution, and kept in custody till he paid the money. *Hern* 121.

That *T.* demised lands to the plaintiff for a term of years rendering rent, and the defendant, in consideration that the plaintiff would assign the term to him, undertook to pay the rent, or to indemnify the plaintiff therefrom; a breach, that the defendant had not paid the rent, nor indemnified the plaintiff, who was forced to pay the money, without alledging any suit. 3 *Brownl.* 51.

In consideration that the plaintiff being under-sheriff, who endeavoured to execute a writ of *ca. fa.* the defendant undertook to give him 5 l. and to indemnify the plaintiff, who arrested the party, and carried him to the house of commons, and he was there discharged, and the plaintiff was obliged to lay out several sums of money thereon. *Hern.* 120.

Declarations in Actions upon a Warranty.

For selling cows warranting them to be sound, and big with calf, whereas one of them was barren, and the other had only three teats. 1 *Brown.* 15.

The like of sheep. 1 *Brown.* 30. *Cl. Man.* 111. *Tbo.* 40. *Cl. Man.* 148.

The like of a horse. *Vid.* 10. *Pl. Gen.* 18. *Han.* 84. *Tbo.* 30. 2 *Mod. Int.* 89. *Ra. Ent.* 9. *Vet. Int.* 19. *Reg.* 108. *Hern* 223.

The like laid three manner of ways, viz. 1. For that the defendant fraudulently sold a foundered horse to the plaintiff, affirming him to be sound. 2. For that the defendant fraudulently sold another horse to the plaintiff that was lame, warranting him to be sound.

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found, 3. For that the defendant promised for such a price, to sell the plaintiff another horse without any infirmity, and falsely and *de- P *473.
ceitfully delivered the plaintiff a foundered horse. *Clift* 932.

For selling yarn, warranting it fit to make cloth, which was not so. 1 *Brown*. 15.

The like of wool in the fleece. *Clift*. 934.

For selling the cow of another warranting it to be the defendant's own. *Tbo*. 40.

The like of a horse. *Clift* 933. *Asb* 35.

For warranting butter and cheese to be good, which were not so. *Clift* 935.

The like of hops. *Ibid*.

The like of wine. *Clift* 938. *Hern* 92.

The like of wool and cloth wanting measure. *Tbo*. 34.

The like of paper. *Bro. Red*. 18.

The like of timber. *Bro. Red*. 80.

The like of malt. *Ra. Ent*. 9. *Reg*. 111. *Ub*. 245.

For warranting sacks of wool to contain so much. *Dig*. 179.
13 *H*. 4. 1.

For warranting a horse hired to be fit for a journey, which was unable to perform it. *Hern* 169. 1 *Brown*. 38.

Declarations in Actions of Deceit.

For selling the plaintiff a cow of another person. 1 *Brown*. 25.
Hern. 102, 224. *Asb* 35.

The like of a horse of another exchanged with the plaintiff, which the defendant pretended was his own. *Clift* 72. *Hern* 77.

For wool bought of the defendant by the plaintiff, and sold to another person. *Pl. Gen*. 14, 19. *Ro. Ent*. 29.

For deceit, in not performing a bargain concerning cubit-wood. *Clift* 96.

For making a bond to the plaintiff by a false christian name. 1 *Brown* 27.

That the defendant procured men unknown to become bail for *W*. by fictitious names, whereby *W*. was suffered to escape, and the plaintiff lost his debt. 1 *Brown*. 52.

For maliciously procuring the plaintiff to be outlawed in the king's bench, and taken thereupon. 1 *Brown*. 87.

For playing with the plaintiff at hazard with false dice, and an *indebitatus assumpsit* for money had and received. 2 *Brown*. 14.
Cl. Man. 123.

The like with false cards. *Tbo*. 26.

Against a butcher for selling tallow by false weights. *Han*. 32.

Against the defendant for selling with false measure. *Tbo*. 25.
Against

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Against a bargeman who had malt delivered him to carry, and did not deliver so many quarters as were delivered by the plaintiff. *Ro. Ent.* 31.

For falsly presenting a fact by the jurors to a manor court, by which another was admitted, and the plaintiff was fraudulently deprived of his bargain. *Bro. Red.* 17.

Upon a sale of barley, affirming it to be fit to sow, and delivering barley mow-burnt. *Clift* 937.

For selling corrupt herrings. *Cl. Aff.* 215.

For a brewer against a malster, for selling bad malt. *A/b* 36.

For selling the plaintiff wax, and delivering part thereof mixed with *rosin*. *Dyer* 75.

Against a goldsmith who sold the plaintiff a saphire for a diamond. *Hern.* 100.

Declarations against Attornies for undue Practices in their Employments.

Against an attorney who acknowledged satisfaction upon a judgment in debt without a warrant. 1 *Brown.* 26. *Ro. Ent.* 37.

Against an attorney who appeared without a warrant for the plaintiff to an original without process. *Cl. Aff.* 286. *Hern* 145, 180. *A/b* 38.

Against an attorney for suing out a *ca. sa.* without a warrant. *Bro. Red.* 47.

The like upon an *exigent*, where there was a declaration and a judgment in debt by *non sum informatus*, and the money paid by the plaintiff, and a verdict for the plaintiff in this action, and an observation that the judgment was arrested. *Ro. Ent.* 15. *Hern* 143.

The like against an attorney who made a default, whereby there was a judgment against the plaintiff. 2 *Inst. Cl.* 184.

The like where there was an outlawry after judgment. *Ro. Ent.* 98.

Against an attorney who tore and obliterated a bill delivered to him, whereby the plaintiff could not recover his debt. *Cl. Aff.* 269. *A/b* 16.

P *474. *Against a chief clerk of the king's bench, who appeared for the plaintiff upon a *latitat* without a warrant, whereupon there was a declaration, and judgment. *Bro. Red.* 12. 1 *Brownl.* 195.

Against an attorney who took fees for entering six issues upon record, who entered but five. 1 *Brown.* 33.

Against an attorney, who caused the plaintiff to be taken in execution at the suit of *T.* without his consent, and knowing the plaintiff to have a release. 1 *Brown.* 78.

Against an attorney who recovered against the plaintiff at the suit of *H.* and sued out a *fi. fa.* thereon, after an agreement made, between the plaintiff and *H.* 1 *Brown.* 85.

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Against an attorney, who in consideration that the plaintiff would give him a warrant of attorney to confess judgment, undertook that the plaintiff should be acquitted, whereas he was taken into custody thereupon by a *latitat*. *Tho.* 21.

Against an attorney who counterfeited a writ of *latitat*, whereupon the plaintiff was taken and imprisoned. *Tho.* 31.

By the sheriff against an attorney, who counterfeited a warrant upon a writ of *capias*. *Bro. Red.* 50.

Against an attorney who procured a judgment to be signed upon a *posse*, and sued out a writ of *feri facias* against the plaintiff before the time expired; that the plaintiff should shew cause why judgment should not be given. *Tho.* 43.

Against an attorney of the sheriffs court of *London*, who did not prosecute a plaint against *J.* at the suit of the plaintiff, so for want of a declaration *J.* was discharged. *Vid.* 16.

The like against an attorney, by which the defendant recovered upon a *non-profs* against the plaintiff. *Cl. Aff.* 278.

Against an attorney who prayed an imparlance to debt upon a bond, without entering the condition for the performance of covenants, whereby the plaintiff was not admitted to plead covenants performed. *Rob. Ent.* 59. *Hern* 197.

Against an attorney who sued out an exigent in debt, and delivered no proclamations to the sheriff. *Vid.* 63. *Hern* 200.

Against an attorney who took the plaintiff in execution upon a judgment on a *non-profs* after a release sealed to him by the defendant in the action. *Bro. Red.* 65.

Against an attorney for not paying a fine in trespass, and not suing out a writ of *superfedeas* to an *exigent*, being retained for that purpose. *1 Ero.* 33.

Against an attorney, who undertook to deliver to the plaintiff a *feri facias* upon a judgment acknowledged by a warrant of attorney by the plaintiff's debtor, and had not done it. *Re. Dec.* 33.

Against a clerk of an office, who unduly obtained judgment against one *H. B.* who afterwards died intestate, and thereupon had letters of administration of the goods of the said *H. B.* and pleaded that judgment as a true judgment in bar to the plaintiff, by means whereof he was defeated of his debt. *Red. Dec.* 80.

For an attorney against an attorney for an arrest and imprisonment upon a writ of privilege, and procuring the plaintiff to be arrested at the suits of others, when there was no cause of action. *Ro. Ent.* 90.

Where one *H. H.* being indebted to the plaintiff in 86 l. and the said *H.* being seized in fee of lands to the value of 300 l. and the plaintiff having sued *H.* for his debt, the defendant and *H.* set up a fraudulent conveyance to deprive the plaintiff of his debt. *Re. Dec.* 85, 86.

Against

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Against an attorney who was retained for a tenant in *dower*, for making a default after an imparlance. *Raft. Ent. 2. Vet. Ent. 51.*

Against an attorney, who delivered up a bond to the obligor, which was given him by the obligee to sue upon. *Latch 122.*

Against an attorney in an hundred court, who undertook to essoin for the plaintiff in several actions of debt, whereupon he had a day given him to wage his law, and had not essoined; whereupon judgment was given against the plaintiff. *Reg. 116.*

Against an attorney for a plea of land who by collusion between him and the tenant, made default at the day given by the court, whereby the plaintiff lost his land. *Reg. 113.*

The like where he acknowledged the action in a *quare impedit*. *Reg. 116.*

Against an attorney who appeared for the plaintiff, without a warrant from the plaintiff, to an original without process; whereupon there was an imparlance, a judgment upon a *non sum informatus*, a *scire facias*, an execution by default on a *ca. fa.* 3 *Brownl. 98.*

P *475. *Against an attorney, who upon receipt of the principal debt and damages the next term acknowledged satisfaction upon record. 3 *Brownl. 63.*

Against Sheriffs and other Officers.

Against the bailiff of a liberty, who had not returned the writ after making the arrest. 1 *Bro. 42. Ro. Ent. 87.*

Against the bailiff of a liberty, who executed a *feri facias*, and yet returned *nulla bona*. *Vid. 6.*

Against the mayor and commonalty of the city of C. for a false return upon a *mandamus*, to restore an alderman to his precedency, where the writ and return is recited. *Vid. 1.*

The like against the master and fellows of a college, and for a scandalous and false return of a *mandamus*. *Vid. 1.*

Against the steward of a hundred, who caused cattle to be taken out of his custody by a replevin, without having any pledges for his prosecution found and returned. *Bro. Red. 25.*

Against a bailiff of an inferior court, who withdrew himself when an inquisition ought to have been taken after an attachment for goods in debt, whereby the action was discontinued, and the goods delivered, the debt not being satisfied. *Bro. Red. 73. Reg. 99.*

Against a sheriff's bailiff, who refused to take good bail for the plaintiff upon an arrest. *Bro. Red. 63.*

Against a bailiff who returned to the sheriff, that the plaintiff made a rescue, whereas there was no rescue. *Cl. Man. 182.*

Against an escheater for not taking an inquisition by a jury, but returning the writ of his own head into a court of chancery, whereby the

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the plaintiff was removed from the possession of a manor demised to him by a guardian of an heir. *Reg.* 115.

Against a chirographer of the common pleas, who had ill endorsed the proclamations of a fine, whereby the plaintiff lost his lands upon a formedon. *Co. Ent.* 15.

Against a bishop for not admitting the plaintiff upon a judgment in *quare impedit*. *Hern* 176.

Against a sheriff for not arresting a person upon *mesne* process. *Lill. Ent.* 60.

Against a sheriff for taking *insufficient* bail in replevin. *Lill. Ent.* 37.

Against the bailiff of a hundred, who neglected to arrest a person present with him, by a warrant on an *alias capias*. 3 *Brownl.* 40.

Against the sheriff of a city for a contempt, in not proceeding upon a plaint in the city-court, after three writs of *procedendo* delivered to him. *Rast. Ent.* 83.

Against the clerk of the errors, for extorting fees upon an *outlawry* after judgment. *Ro. Ent.* 90.

Against a filazer of the common pleas, for suing out a writ of entry upon a disseisin of land held in antient demesne. *Bro. Red.* 53.

Against the deputy of the allnages, who deceitfully and knowingly fixed upon a piece of cloth the plaintiff's seal, called a *Kersey seal*, in the place of a seal called a *half cloth*, by which the cloth was forfeited to the king. *Vid.* 51.

For the late sheriff, against the bailiff of a hundred, who by the plaintiff's warrant, levied money payable to the king's exchequer, and did not pay it to the plaintiff. *Ro. Ent.* 13.

Against Sheriffs and other Officers for Escapes.

Against the sheriff upon a *capias utlagatum* before judgment. 1 *Brown.* 18. *Bro. Red.* 33.

The like after a declaration, and before judgment. 2 *Mo. Int.* 96. 1 *Brownl.* 227. 3 *Brownl.* 39, 94. *Hern* 74. *Ash* 32.

The like after judgment. 2 *Mo. Int.* 98. 2 *Inst. Cl.* 189.

The like where *languidus in prisona* was returned. *Ro. Int.* 9. *Hern* 167.

For an escape upon a *ca. sa.* on an outlawry after judgment. *Ro. Ent.* 100. 3 *Brownl.* 89.

The like against the sheriff on a *mesne* process. 3 *Lev. Rep.* 42, 45. *Hern* 129. *Lill. Ent.* 60.

Against the sheriff of *Middlesex* upon an escape from an arrest by a bill of *Middlesex*. *Tho.* 31. *Han.* 18. *Ub.* 47.

The like against the sheriff upon a *latitat*. *Ro. Ent.* 303. The like against the late sheriff. *Id.*

The like upon a *ca. sa.* after a recovery in assault. *Id.* 305.

Against

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Against the sheriff for an escape of one committed on an *excommunicato capiendo*. *Lill. Ent.* 87.

Against the under-sheriff where a *ca. sa.* issued, and the plaintiff was thereupon taken, and in custody of the defendant for 29l. 12s. whereupon, in consideration that the plaintiff would pay the 29l. 12s. to the defendant, he promised to discharge the plaintiff out of prison, and to repay that money to the plaintiff, upon discharging the writ. *Re. Decl.* 25.

P *476. *Against the sheriff for insufficient security upon an arrest on a bill of *Middlesex*. 2 *Saund.* 51.

The like, and a *cepi corpus*. returned by the sheriff. 2 *Saund.* 150.

Against the sheriffs of *London*, for an escape upon a process out of the mayor's court. 1 *Brown.* 49. *Hern* 129.

The like upon a plaint levied in the compt. *Ro. Ent.* 298, 308.

The like upon an arrest and imprisonment, in the time of the former sheriff, who going out of his office, delivered the prisoners to the custody of the defendant. *Vid.* 15.

Against the sheriff for an escape upon an attachment of privilege. *Cl. Aff.* 261. *Hern* 128.

Against the bailiff of a liberty upon an escape, reciting the whole judgment thereupon. *Ro. Ent.* 311.

For the marshal of the king's bench, against the warden of the fleet, for an escape of one arrested by the bailiff of the liberty of *Westminster* upon a *ca. sa.* and committed to the fleet in execution, by a judge of the common pleas by a *habeas corpus*. 2 *Brown.* 13.

Against the keeper of the prison of Ludgate, upon an escape of a bankrupt committed to him by the commissioners. *Ro. Ent.* 82. *Hern* 184.

Against a bailiff of a liberty for an escape of one arrested upon a *capias* in debt at the suit of the plaintiff. *Re. Decl.* 89.

The like against an attorney being bailiff of a franchise. *Cl. Aff.* 280.

The like upon a bill of *Middlesex*. *Vid.* 40. *Ro. Ent.* 299.

The like upon a *ca. sa.* after two *sci. sa.* returned. *Ro. Ent.* 309.

Against the warden of the fleet upon an escape. *Re. Dec.* 93.

Against the marshal of the king's bench, where the prisoner by a *habeas corpus*, was committed to the fleet, and afterward by another writ committed to the marshal. *Ro. Ent.* 306.

Against the deputy marshal for an escape. *Ro. Ent.* 300.

Against the serjeant at mace for an escape of one arrested upon a plaint levied in the counter, and thereupon the custom of the city is set forth. *Bro. Met.* 21.

For an escape upon a statute-merchant. *Reg.* 98.

The like upon a *capias ad computandum*. *Ash* 13.

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Against Sheriffs and other Officers for a false Return.

Against the bailiff of a liberty for an escape, and falsely returning *non est inventus* after an arrest annually made. *Bro. Red.* 52.

Against the sheriff, who neglected to execute a *ca. sa.* upon one then being present, and falsely returned *non est inventus*. *Tho.* 88. *3 Brownl.* 35. *Ash* 57.

The like upon a statute-staple. *Ro. Ent.* 9. *Hern* 167.

The like upon a special *capias utlagatum*, and returning *nulla bona*. *2 Vent.* 84. *Ub.* 123.

Against the sheriff for a false return upon a *sci. fa.* that the defendant being an executor, had wasted the goods. *Ro. Ent.* 24, 59. *Bro. Red.* 38.

The like for an administrator. *Ro. Ent.* 61. *Bro. Red.* 37. *2 Inst. Cl.* 186.

Against the sheriff, who upon a *feri facias* returned, that he had taken goods to the value of the debt which remained unfold, and had not returned a *venditioni exponas* delivered to him, but converted the money to his own use. *Bro. Red.* 36. *1 Brownl.* 233.

The like against the bailiff of a liberty, who executed a *feri facias*, and returned *nulla bona*. *Vid.* 6. *Lill. Ent.* 40.

Against the sheriff who executed a writ of *seisin* and *elegit* in waste, after a *supersedeas*, and upon a writ of error allowed and delivered to him. *Ro. Ent.* 47. *Hern* 213.

Against a bishop for a false return upon a *fi. fa.* *1 Sid.* 279.

For Sheriffs and other Officers.

For a sheriff against one taken in execution, who in consideration that the plaintiff would permit him to go at large with two servants, promised to return a prisoner within the day. *Ro. Ent.* 96.

By a gaoler against a prisoner for breaking the gaol. *2 Mo. Ent.* 95.

Vid. Title against officers.

Vid. Title against attornies.

For a sheriff against the gaol-keeper, for permitting prisoners to escape. *Reg.* 110.

Against a rescuer upon a *non omittas ca. sa.* *Hern* 68.

For a gaol-keeper against one committed by auditors, for the arrears of an account who escaped, whereby the plaintiff was obliged to pay the money. *Fitz. N. B.* 95. 130.

*For the late sheriff against a bailiff of a hundred, who by the P *477. plaintiff's warrant had levied monies payable into the exchequer, and had not paid it to the plaintiff. *Hern.* 165. *Ro. Ent.* 13.

For

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For a sheriff against an attorney, who had counterfeited a warrant upon a writ of *Capias*. *Bro. Red.* 50.

For Injuries to Franchises.

For a guardian and bailiff of a liberty of *P.* who by letters patent from the Queen Consort, had the execution and return of writs within the liberty against one who arrested a man within that liberty. *Tho.* 42.

The like for a lord of a hundred against the sheriff's bailiff, upon a title specially shewn forth in the pleadings. *Wi. Ent.* 83.

The like for a lord of seven hundreds, against a sheriff upon several breaches. *Vid.* 55.

For the mayor and citizens of *York*, who had the execution and return of writs within the city by a prescription against the sheriff's bailiff, who arrested a man within the mayor's liberty, and imprisoned him in the prison of the church. *Bro. Red.* 47. *1 Brown.* 154.

The like for a bishop by a prescription. *Bro. Red.* 49. *Brev.* 124. *Hern.* 224. *Ash* 34.

For a lord of a manor, who had a court of view and frankpledge, against one who held another court of view of frankpledge within the same will by another name. *Ro. Ent.* 88. *Ra. Ent.* 425.

For a plaintiff seized of a passage over a water against the defendant, who carried persons cross the water in his boat. *Ro. Ent.* 51. *Pl. gen.* 18.

For erecting a new market, by which the market of the plaintiff was damaged. *2 Saund.* 172. The like of a fair. *Lill. Ent.* 30.

For the lord of a barony, who had the execution and return of writs within that barony by prescription, against one who arrested a man within that barony. *1 Brown.* 70. *Hern* 103, 225.

For the lord of a manor, who had a court-baron every three weeks, for obstructing his steward and tenants from holding a court, by threatening them of their lives. *Ub.* 238.

Where the plaintiff by prescription had the execution and return of writs within an honour, and the defendant took cattle in the name of a distress within the honour, and drove and impounded them out of the honour. *Reg.* 104.

For Illegal Prosecutions.

For arresting the plaintiff in a city-court without any cause of action. *1 Brown.* 38.

The like where the court had no jurisdiction. *Clift* 35. *Ash* 4.

The like founded upon the custom of the realm. *Id.* 35.

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The like, and detaining the plaintiff in prison till he *found bail*.
Bro. Red. 61. *Clift.* 34.

The like upon process out of the king's bench. *Bro. Met.* 25.

The like upon a *capias* out of the common pleas, and process out of an inferiour at the suit of the defendant, without any cause of action. *Tho.* 70.

The like upon a *capias* out of the common pleas, and an *acetiam* at the suit of the defendant, *Bro. Red.* 50.

The like upon a bill of *Middlesex*, at the suit of the defendant and others. *Vid.* 36.

For an undue prosecution in the court of the principality of *Wales*. *Ro. Ent.* 16.

For attaching the plaintiff's goods at the suit of *R.* without his consent. *Han.* 53.

For that the plaintiff was twice arrested against the defendant's own undertaking to the contrary. *Cl. Aff.* 230.

By an attorney against another, who drew him into a suit before commissioners concerning causes ecclesiastical, and for the undue exercise of his office of an attorney. *Cl. Aff.* 255.

The like for suing the plaintiff in the *spiritual court* without a cause. *Clift* 34.

For that the defendant caused the plaintiff to be arrested in *London* for scandal. *Cl. Aff.* 213.

For that the defendant maliciously sued out a writ of *Ca. Sa.* in the name of another without a warrant. *Bro. Red.* 47.

For pronouncing the plaintiff to be excommunicated without a reasonable cause. 2 *Brownl.* 20. *Tho.* 50.

For prosecuting the plaintiff upon a sheriff's bond without a cause. *Clift* 33.

For suing in the court of admiralty. *Ra. Ent.* 23, 24. *Dy.* 159.

For suing in the spiritual court after a prohibition. *Fitz. Nat. Brev.* 92.

*For executing a writ after a writ of error allowed. *Hern* 233. P *478.

In Actions for Rescues.

Against a rescuer, who rescued goods taken in the name of a distress for rent in arrear. *Ro. Ent.* 12. *Lill. Ent.* 378, 379.

The like of a heifer taken for a relief. *Bro. Red.* 42.

Against one who rescued a prisoner taken upon a *latitat*, at the suit of the plaintiff. *Bro. Red.* 48, 49. *Mod. Int.* 23. *Brownl.* 255. *Brownl.* 90.

The like of one taken upon a *capias* in debt. *Han.* 32. 3 *Brownl.* 42.

The like upon a *capias utlagatum*, *Ro. Ent.* 21. *Hern.* 341.

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The like upon a bill of *Middlesex*, sued out upon a recognizance, acknowledged before the chief justice of the common pleas. *Han.* 47.

The like upon a writ of *Rebellion* in chancery, upon an execution of a decree. *Han.* 8.

Against one, who together with others, rescued sheep taken *damage-fezant*. *Bro. Red.* 59.

For a sheriff against a rescuer upon a *non omittas Ca. Sa.* *Hern* 68.

Against Doctors, Apothecaries and Surgeons, for Misbehaviour in their Professions.

That the defendant pretending himself to be a skilful surgeon for money paid, and to be paid, undertook to cure the plaintiff of a disease in his nose, called *noli me tangere*, which he had not done; but being unskilful, applied ill medicines, whereby the nose, became corroded and putrefied. *Bro. Red.* 35. 2 *Inft. Cl.* 194. 1 *Brownl.* 232. *Hern* 135.

That the defendant for money in hand paid, undertook to cure the plaintiff of a disease called the cholick; and the defendant gave the plaintiff an unwholesome medicine, whereby the plaintiff was confined to his bed, and remained in a languishing condition for five weeks. *Bro. Va. Me.* 9.

That the defendant for 40l. whereof 20l. was paid, undertook to cure the plaintiff's son's foot; which by the defendant's negligence became incurable. *Bro. Red.* 59. *Cl. Aff.* 259.

That the defendant undertook to cure the plaintiff's horse of a disease in his foot, which he so indiscreetly handled, that the horse died. *Cl. Aff.* 259.

Others for unskilful medicines applied to horses. *Dig.* 204. 43 *E.* 3. 33. *Ra. Ent.* 463. *Reg.* 110. *Aff.* 12. *Kit.* 179. *Thf.* 90.

That the defendant pretending himself to be skilful, for money paid and to be paid, undertook to cure the plaintiff with a disease of the stone, and an excoriation in the bladder, which he had not done, but had applied unwholesome medicines not being a licensed physician or surgeon. *Hern* 135.

Where the defendant undertook to cure the plaintiff, but applied unwholesome medicines. *Reg.* 112.

The like for undertaking to cure a broken arm, which by the defendant's negligence became crooked. *Reg.* 105. *Aff.* 15.

The like for undertaking to cure the plaintiff's eye, which he by the negligence of the defendant lost. *Reg.* 105. *Ra. Ent.* 463.

Where the defendant for money paid undertook to cure the plaintiff of a hurt in his leg, who was so negligent in his endeavouring to cure it, and so inartificially cut the nerves and veins, that he became lame in his leg. *Ra. Ent.* 463. *Vet. Ent.* 49.

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For an husband and wife, where the wife was sick of the cholick, and went to the defendant, who unskillfully told her that she had three imposthumes in her body, and undertook to cure her within ten days, but gave her unwholesome medicines, whereby the wife within ten hours was confined to her bed, and there remained in great danger of her life for five weeks. *Ra. Ent.* 463.

Declarations against Tradesmen founded upon the Custom of the Realm.

Against a carrier for losing goods which he had promised to deliver. *Wi. Ent.* 28. *Cl. Aff.* 262. *Bro. Red.* 12, 16. 2 *Inst. Cl.* 180, 183. *Tho.* 34. 2 *Vent.* 75. 2 *Mo. Int.* 91.

The like of letters to be carried. 1 *Brown.* 54.

Against a common carrier for doing damage to the goods. 2 *Mod. Int.* 90, 91.

Against a common waterman for being so negligent in carrying goods and money that they were lost. *Vid.* 37. 2 *Mod. Int.* 92. *Clift* 39.

The like against a hoy-man. *Clift* 38.

Against a smith for laming a horse in shoeing him. 1 *Brown.* 35. 2 *Inst. Cl.* 172.

Against an innkeeper for a horse delivered to him, and his negligently keeping him so that he died. 1 *Brown* 80. *Rob. Ent.* 10. 2 *Inst. Cl.* 175.

*Against an innkeeper for his negligence in keeping a gelding, so that it was stole out of the pasture by thieves. *Rob. Ent.* 16, 21, 23. *Bro. Red.* 16. 2 *Inst. Cl.* 174, 177. *Thomp.* 14.

Against a carter who drove his cart upon the plaintiff's sow, by which she was killed. *Cl. Man.* 70.

Against a letter carrier, who carried letters from the post-office to *Gray's Inn*, and had not delivered them according to the superscription. *Ro. Ent.* 103, 104.

Against an husbandman, who had undertaken to till and sow lands with grain, and performed it so negligently, that the lands and grain became unfruitful. 1 *Bro.* 72.

Against a glazier for not glazing windows according to his contract. *Pl. gen.* 20.

For carelessly driving a coach with two horses, so that the horses run upon the plaintiff, and the defendant run over him, whereby he became lame. *Bro. Red.* 484.

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For Disturbance of Common.

For that the defendant *inclosed* the *common*, so that the plaintiff could not enjoy his common. *Cl. Man.* 186.

For a *Customary Tenant* who had *Common* of pasture, in a pasture called *T.* and *B.* for sheep, horses and cows, lying upon the tenements for a whole year; whereas the defendant put in his cattle upon the common, whereby the plaintiff could not enjoy his common. *Wi. Ent.* 49. 9 *Co.* 112. *Hern* 117.

That the plaintiff seised of a messuage and lands, had *common* of pasture in *L.* for all cattle levant, &c. for the whole year, and the defendant inclosed forty acres in the common for coney-burrows, and kept conies. The like for all commonable cattle in a wood, and the defendant so *inclosed* the wood, that the plaintiff could not make use of his *common*. *Wi. Ent.* 42, 76. 2 *Instr. Cl.* 241. *Hern* 125.

For right of common for three cows, &c. and for a foot-way, 2 *Mo. Int.* 85.

That the plaintiff seised of a messuage and lands, had *common* for such cattle in such a place every year, when the field should be sown, then after the corn was carried away until the field should be re-sown, and through the whole year, when the field should lie fallow; and the defendant with carts, &c. subverted the *common*. 1 *Brown.* 47.

The like where the plaintiff had *common* for all great cattle called *rother beasts* levant, &c. in such a waste throughout the whole year; and the defendant erected hedges and ditches upon the *common*, and hindered the plaintiff from his *common*. *Tho.* 33.

Where the plaintiff seised of a messuage, &c. had *common* for all cattle in *B.* fenn throughout the whole year; and the defendant put his cattle into the *common*. *Tho.* 40.

The plaintiff seised of a messuage had *common* for all commonable cattle, and the defendant furcharged the pasture, with an intention to obstruct the plaintiff of his *common*. *Ro. Ent.* 42.

The plaintiff seised of a *foldage*, and the liberty of a *sheep course* in a close called *N.* for 600 sheep, when the close should be unsown; and the defendant inclosed the close with hedges and ditches; so that the plaintiff could not enjoy his *foldage*. *Wi. Ent.* 71, 91.

That *A. B.* seised of a manor, &c. had the liberty of a *foldage*, and a *sheep course*, in the customary closes of the defendant, for sheep not exceeding the number of 300. from such a feast to such a feast every year, when the closes should not be sown with grain, leased the premises to the plaintiff; and the defendant drove the sheep from the pasture, so that one of them was lost, and the rest were damaged; and that he likewise inclosed part of the *common* with hedges and ditches. *Bro. Red.* 65. *Co. Ent.* 14.

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For an *assignee* of a term, who ought to have *common of pasture* for 300 sheep and one ram every day throughout the whole year; and the defendant drove out the plaintiff's sheep with dogs, and would not permit the plaintiff to enjoy his *pasture* there for a long time, so that part of the plaintiff's sheep died. *Ro. Ent. 62. Hern. 64.*

That the plaintiff seized of a messuage and lands, had a *foldage* and *fold course* for 500 sheep, upon a great waste called, &c. throughout the whole year; and the defendant dug pits, and so artfully covered them over with grass, that thereby the plaintiff lost the profit of his *foldage*. *Wi. Ent. 91.*

That the plaintiff seized of a messuage and lands, had *common* for all cattle levant, &c. throughout the whole year; and the defendant built a house there, and made burrows for conies, and placed hedges about the *common* to make a warren. *Wi. Ent. 82.*

For lessees who had a right of *common* in a close for all commonable cattle for two running years, when the close should be sown after the grain was carried away, and every third year throughout the whole year when it lay fallow, part of which the defendant inclosed. *Han. 23.*

The plaintiff seized of a messuage and lands, had *common* in such pasture for 460 sheep levant, &c. throughout the whole year; and the defendant having no right put in his cattle. *Bro. Red. 44.*

That the plaintiff seized of a messuage, &c. had *common of estovers* in lands for necessary firing, and the defendant with an intent to hinder the plaintiff of his *common*, cut down, and carried away a load of furze and heath, whereby the plaintiff lost the benefit of his *common*. *Bro. Red. 73.*

That the plaintiff possessed of lands, who had the liberty of *foldage* of all sheep feeding, and depasturing in the common fields G. day after day upon his lands; and the defendant did not fold his sheep upon the plaintiff's lands, whereby he lost the benefit of his *foldage*. *2 Ven. 136.*

For erecting a mill whereby the plaintiff was prejudiced in his *common*. *2 Mod. Int. 88.*

For digging up the soil, &c. to the prejudice of the plaintiff's *common*. *Id. 250.*

Where the plaintiff had *common* after the corn was reaped in seven acres, which the defendant inclosed. *3 Brownl. 96. Hern 64.*

For a lessee of a copyholder for digging turf in the *common*. *Hern 80.*

Where the plaintiff seized of a messuage and lands, had *common* for all great cattle levant, &c. throughout the whole year. *Hern. 64.*

Where the plaintiff seized of lands had *common*, and the defendant surcharged the lands, with an intent to hinder the plaintiff of his *common*. *Hern 207.*

For erecting a house upon lands where the plaintiff had *common*. *Brownl. 76.*

Where

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Where the plaintiff was seised of a manor, had *common* of pasture; whereupon the defendant inclosed part, and put his cattle upon the residue, whereby he discharged the *common*, *Ash* 60. where the defendant dug a clay-pit in the *common*, wherein the plaintiff's horse fell, and was killed. *Hern* 123.

Where the plaintiff seised of a messuage and lands, had *common* for such cattle in such a pasture throughout the whole year; and the defendant having no right, put cattle in there to pasture. *1 Brownl.* 249.

For destroying the plaintiff's *common* with conies. *Lill. Ent.* 62.

For Disturbance of a Way.

For a *Vicar* of a church being hindered of a way to carry his tithes, by making a ditch cross the way, &c. *2 Brownl.* 9. *Reg.* 105. *1 Brownl.* 189.

The like for a *Rector* of a church for inclosing a field, that the plaintiff and his servants could not enter to carry away the tithes. *Bro. Red.* 17. *1 Brownl.* 180.

For the *inhabitants* of a *Vill* being obstructed of the highway leading through a parcel of land called *M.* to *R.* by making hedges and a gate. *Vid.* 42. *Ub.* 120.

Where the plaintiff by reason of his *tenure*, had a way which the defendant obstructed by making a wall. *Vid.* 65. *Cl. Man.* 173. *Ash* 15. *Hern* 207.

That the plaintiff seised of a messuage and lands had a way from his messuage to a river to draw water, and to an acre of land part of his tenements for his carriages, and to drive cattle through three acres of the defendant, wherein he dug trenches cross the way. *Bro. Red.* 13. *1 Brownl.* 197.

That the plaintiff seised of a messuage, and close of land, had a way for his plows and carts, from his own house through the lands of the defendant to the plaintiff's close; and the defendant stopped up the way by building a house. *Bro. Red.* 14. *1 Brownl.* 200.

For a *lessee* for years, where the *lessor* had a foot-way from his own messuage through the defendant's close, as well to the town of *W.* as to a river in the defendant's close; and the defendant made ditches across a great part of the way, and built a hedge, and deprived the plaintiff of his way. *Bro. Red.* 43. *2 Inst. Cl.* 238. *Cl. Aff.* 214. *1 Brownl.* 247.

P *481. That the plaintiff possessed of a dwelling in a messuage in such a vill, had a foot-way for himself and servants, from the town of *W.* in and by and through a close called *C.* and *D.* to go and return to and from the town of *B.* and the defendant dug ditches *and trenches across the way, and obstructed the way with hedges and fences. *2 Ven.* 185. Judgment for the plaintiff. *1 Brownl.* 247.

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For obstructing the plaintiff in a way which he claimed by prescription. *Id.* 266. the like without a prescription, and the reason thereof. *Lill. Ent.* 72.

That the plaintiff by reason of his lordship, had a common in such wills at all times in the year, and a way to drive cattle thither, and back again; and the defendant made trenches across the way. *Ra. Ent.* 616. *Vet. Int.* 197.

For customary tenants being obstructed in the use of a way to a market town, by making hedges and ditches across the way in such a close. *Hern* 73.

For Disturbance of Offices.

Against an attorney, who exercised the office of register to the archdeacon of the archdeaconry of T. which had been granted to the plaintiff, and receiving the fees thereto belonging. *Wi. Ent.* 22. 10 Co. 50.

For the steward of the court of several manors obstructed in his office, which had been granted to him for life. *Vid.* 5. The like for a deputy steward of B. *Re. Decl.* 138. 2 *Inst. Cl.* 208. *Ra. Ent.* 59. Co. 42. 1 *Brownl.* 192. *Hern* 232.

The like for an earl, of the office of steward of several manors, granted to him for life by the Queen. *Bro. Red.* 483.

For the herald at arms for disturbance of his office granted to him by the King for life. *Ro. Ent.* 54. *Hern* 133.

The like by a sergeant at arms attending the speaker of the house of commons. *Vid.* 38.

For an attorney being a town clerk for a disturbance in the execution of his office, and for depriving the plaintiff of the fees and profits belonging to him by reason of his office. 1 *Bro.* 59.

For interrupting a steward in choosing proper officers. *Cl. Aff.* 275.

For the deputy clerk of the treasury against the clerk of the treasury and the *custos brevium*, for disturbing the plaintiff in receiving the fees and profits of an office. *Vid.* 18.

Upon a *pluries mandamus* for disturbing the plaintiff in the exercise of his office of alderman of W. in the county of B. *Re. Dec.* 144.

For the mayor, &c. of London, for disturbance of a meter of coals. 3 *Brownl.* 66. *Hern* 102, 141. *Bro. Red.* 119.

For other Disturbances.

For the churchwardens of a church, who used to cut the trees in a church-yard, for repairing the fences of the church-yard; and the

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the defendant by the command of the rector, cut the trees, and carried away the wood. *Ro. Ent.* 44. *Hern* 210.

That the defendant demised a close of pasture for a year, and in consideration of 30*l.* then paid, and of a gelding of the price of 5*l.* delivered to him by the plaintiff, the defendant undertook that the plaintiff should have the close, without the disturbance of any person, and the father of the defendant expelled the plaintiff. *Bro. Bed.* 16. *Hern* 95.

In consideration the plaintiff had to farm lett, a messuage and lands for years under such a rent, the defendant undertook, that the plaintiff should quietly enjoy without the disturbance of any person; and the plaintiff entered and sowed the lands, and one *N.* and the defendant expelled the plaintiff before the end of the term, and before the corn was ripe. *Bro. Red.* 111. *Hern* 95.

For a *customary tenant* against the lord of the manor and another, who cut down the trees upon the customary tenements, whereby the plaintiff had not sufficient firing, hedging, and wood for repairs, according to the custom of the manor. *Bro. Red.* 46. *Hern* 226. 1 *Brownl.* 252.

For disturbance of an *execution* upon a statute-staple, by shutting the doors of an house against the sheriff, and the jury charged, so that they could not have a view of the goods. *Co. Ent.* 12.

Where the plaintiff seised of a messuage by prescription repaired the aisle of a church, and had there seats, and a burying place for his family; and the defendant being the *vicar*, obstructed the plaintiff from making a grave in the aisle, till the plaintiff paid him 6*s.* 8*d.* *Co. Ent.* 8.

For Nuisances as to Water.

That the plaintiff seised of a mill, had a *water course* running in *L.* to his mill; and the defendant broke down a bank, and diverted the water from the mill: *Cl. Aff.* 209. *Han.* 32. 2 *Inst.* *Cl.* 234.

P *482. * For *diverting* of water from an antient *water course*. *Cl. Man.* 120. 2 *Inst.* *Cl.* 231.

For obstructing a *drain*. *Cl. Aff.* 267.

For putting *lime* into the plaintiff's water, and destroying his *Fish*. *Id.* 274.

That the plaintiff seised of two messuages and a garden inclosed by a wall, contiguously adjoining to the King's highway, through which a water course used to run to a yard belonging to a brewhouse; and the defendant with earth and stones *obstructed* the *water course* night to the yard, so that the wall of the house and garden became rotten and decayed, and neither the plaintiff or his tenant could pass through that way. *Wi. Ent.* 47. demurrer thereto.

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That the plaintiff was possessed of a close and meadow for a term of years, and the rainy water descending from the sky, used to run from a hill into the king's highway, and from thence into plaintiff's meadow; and the defendant *diverted* the water course, and thereby the water overflowed the plaintiff's close. *Tho.* 39.

That the plaintiff was possessed of an antient messuage adjoining to a water course, and the defendant in throwing down great quantities of filth, *stopped up the water course*, whereby the water rushed upon, and overflowed the messuage, and spoiled the plaintiff's goods. 1 *Brownl.* 57. 2 *Inst. Cl.* 235.

For that the defendant had so raised water into a pool, that it overflowed the plaintiff's close, whereby he lost the profits thereof, and his trees were spoiled thereby. *Tho.* 42.

That the plaintiff was seised of ten acres of meadow adjoining to a rivulet to the defendant's mill, and the defendant so raised up the water into a pool, that it overflowed the plaintiff's meadow. *Brownl.* 40. 2 *Inst. Cl.* 237. The like of two closes. *Rob. Ent.* 44. *Cook* 18. *Ash.* 46. 1 *Brownl.* 241.

That the plaintiff seised of a meadow called, &c. and a rivulet used to run on the east side thereof, and another rivulet used to run on the south side thereof called *N.* and the rain falling into the meadow, used to run into the rivulet called *N.* and both the rivulets, and the rain used to run together at the end of the meadow, and the defendant diverted the water course, and thereby overflowed the meadow. *Vid.* 64. *Hern* 203.

For a *customary tenant* against a tanner of tan pits built so near a rivulet, which ran near the plaintiff's messuage, that thereby the water became corrupt and unwholesome. *Rob. Ent.* 66. *Co. Ent.* 29. *Hern* 254.

That the plaintiff was seised of a close of pasture through which a rivulet used to run, in which the plaintiff had a fishery belonging to his close; and the defendant built an house for making allum, &c. and cast rubbish into the rivulet whereby the water became corrupt, and destroyed the fish, and the plaintiff's cattle were not able to drink it. *Tho.* 26.

For not repairing of sea-banks against the ebbing and flowing of the sea, which the defendant ought to repair, whereby the water overflowed the plaintiff's lands. *Bro. Red.* 67. 2 *Inst. Cl.* 113.

For permitting a shed lately built by the defendant's husband to remain to the prejudice of the plaintiff's house, whereby the water ran from the shed upon the plaintiff's house. 2 *Brownl.* 57.

That the plaintiff was seised of two antient and decayed fulling mills, to which a great part of the water of a rivulet used to run, and built a corn mill instead of them; and the defendant broke down banks, and diverted the water. 4 *Co.* 84.

For diverting a great *water course* from a mill, by making a whirlpool, and a ditch across a water course. *Dyer* 248.

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That the plaintiff was seised of a mill, and ten acres of land adjoining to a rivulet, and the water of the rivulet used to run to the mill; and the defendant obstructed the water from running to the mill, by making a sluice, and thereby caused the water to overflow the meadow. 2 *Brownl.* 62. *Hern* 133.

For a lessee of a mill for diverting water, by making a rivulet. 3 *Brownl.* 45.

For the lessee of a mill for the defendant's diverting water to his own new erected mill. *Hern* 82.

For the defendant's erecting a mill so near the plaintiff's mill, that the water flowed back again to the wheel of the plaintiff's mill, so that he could not grind, &c. *Hern* 120.

By making a bank cross a water-course, whereby the water overflowed the plaintiff's pasture thereto adjoining. *Ub.* 230.

That the plaintiff being a tenant by the courtesy of *England* of a meadow, near which a rivulet used to run, the defendant dug upon the banks of the meadow, whereby part of the meadow was overflowed. *Ash* 56.

P *483. • That the plaintiff by reason of his tenure had a separate fishery, and the defendant erected a dye-house, and caused filth to run into the fishery. *Rast. Ent.* 442.

For a lessee of a house in *London*, who had a leaden pipe to convey water from his kitchen, through the defendant's yard into the street; and the defendant placed a heap of coals in his yard near the wall of the messuage, and thereby obstructed the water-course, and decayed the wall. *Ash* 43.

For an assignee of a term in an house, a well, and a leaden conduit, and the defendant fixed a leaden pipe to the conduit, and diverted the water-course from the messuage. *Ash* 44.

For diverting an antient water-course, whereby the plaintiff lost the benefit of his mill. *Lill. Ent.* 55.

For Obstructing the Plaintiff's Lights.

For the plaintiff lessee of a house in the city of *D.* for darkening two antient lights, and building a wood-pile in a yard, near adjoining. *Ro. Ent.* 7. *Cl. Man.* 57. *Hern* 140.

For stopping up lights in *London*. *Wi. Ent.* 46. *Cl. Man.* 188. 2 *Instr. Clerical.* 244, 247. *Ro. Ent.* 8. *Co. Ent.* 200. *Ash* 49. 1 *Brownl.* 230.

By an assignee of a lessee in the city of *Westminster*. 2 *Mo. Int.* 87.

That the plaintiff being lessee of an house in *London*, had antient windows in the kitchen thereof, and the defendant being possessed of another house near adjoining to the plaintiff's house, erected a new building

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building near the plaintiff's kitchen, that in a great measure it obstructed the light from coming into the plaintiff's kitchen. *Vid.* 28.

The like for newly erecting a building which darkened seven windows of the plaintiff's house. *Bro. Red.* 34. *Vid.* 6. *Hern* 98. *Lill. Ent.* 81, 82.

The like for erecting a new shed, whereby the light was obstructed from coming into the plaintiff's windows and shop. *Wi. Ent.* 46.

For a *customary tenant* seized of a house in *Stepney*, wherein he had four windows; and the defendant being possessed of another house and yard; whereupon the defendant had newly built two chimnies so near the plaintiff's house, that they not only obstructed his lights, but the rain descended upon the plaintiff's soil. *Tho.* 26.

That the plaintiff being seized of a messuage, and a piece of land adjacent, and the defendant being possessed of a garden adjacent, built up a wood-pile, and a building for hogs. *Co. Ent.* 19. 9 *Co.* 57.

For continuing the obstruction of lights. *Lill. Ent.* 82.

For Erections, or the Continuance thereof, whereby the Plaintiff is endamaged.

For permitting a *shed* lately erected by the defendant's husband to remain and continue to the annoyance of the plaintiff's house, by the rain falling from the said shed upon the plaintiff's house. 1 *Brown.* 57.

That whereas the plaintiff was seized of an house before the fire of *London*, and which was thereby burnt down, the defendant was possessed of another house near adjoining; and that the defendant placed pieces of timber across in such a manner, that the plaintiff was hindered in rebuilding the said house. *Tho.* 38.

For erecting a new market near the plaintiff's market, whereby the plaintiff was damnified in his market. 2 *Saund.* 172.

That one *S. T.* was seized in fee of *such closes*, and the dean and chapter of *W.* of *other closes*, and that they, and *S. T.* had a fair by prescription, for the selling of sheep there; that the plaintiff's being possessed thereof, the defendant built other pens contiguous, to the prejudice of the plaintiffs fair. *Lill. Ent.* 30.

That the plaintiff being a lessee of an house in *London* which he intended to raise higher; and the defendant built a house adjacent, so over-hanging the plaintiff's house, that he was not only hindered in building it higher, but it darkened his lights. 3 *Brownl.* 46. *Hern* 197.

For erecting a mill to the damage of the plaintiff's mill, *Ra. Ent.* 9.

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That the plaintiff being seized of a messuage and a curtilage, and the defendant being seized of a messuage and curtilage near adjoining, the defendant dug a lime-kiln in his curtilage, so near the plaintiff's curtilage, that the plaintiff's house, and an ash-tree there growing, and a great part of the ground fell into the lime-kiln. *Ash* 47.

For not repairing, &c.

P *484. For a *lessee* of a messuage and lands, and the defendant being *seized of a messuage and lands, ought to make and repair the *fences* between the plaintiff's and defendant's messuage and lands, which were out of repair. *1 Brown*. 28. *Cl. Man*. 185.

That the plaintiff seized of a close, and the defendant possessed of another close near adjoining, ought to repair the *hedges* between the two closes; for want whereof strangers cattle entered, &c. *Th*. 35. *Ro. Ent*. 52. *1 Brown*. 28, 66.

The like for want of repairing of *walls*. *Bro. Red*. 20, 67, 486. *2 Inst. Cl*. 115, 116

For not repairing *fences* adjoining to a *common*, whereby the plaintiff's cattle went into the common, and from thence into the closes of the defendant, and of other persons, and were impounded, whereby the plaintiff lost the profits and benefit of his cattle, and of the common, and had expended several sums of money in defending suits of law. *Bro. Red*. 62.

For not repairing *sea banks*, whereby the water overflowed the plaintiff's lands. *Bro. Red*. 67.

Against a farmer of a mill, for not repairing the *banks* of a *mill-pool*, so that the water overflowed the lands of the plaintiff near adjoining. *Cl. Man*. 178. *Re. Dec*. 99.

For not repairing the banks of a *water-course* running to the plaintiff's mill, whereby the plaintiff lost the profits of his mill. *Cl. Aff*. 210.

For not repairing a *gutter* between two houses. *Cl. Aff*. 268. *Reg*. 104. *Ash*. 16.

For not repairing a messuage. *Ro. Ent*. 10.

For a *rector* of a church against the executors of the former rector, for not repairing the houses of the rectory. *Hern* 136.

For not enclosing and repairing fences. *Bro. Red*. 486. *2 Inst. Cl*. 115, 116.

For not repairing *fences* whereby the plaintiff's cattle escaped through another's land, and were impounded. *Lill Ent*. 69.

For *dilapidations* brought by the rector, against the executors of the last rector. *Lill Ent*. 21. *1 Lut*. 115.

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For other Nuisances.

That the plaintiff was *lessee* of a kitchen in *London*, part whereof was upon a shop and an entry of the defendant's house, supported by a brick wall, and a wooden post fixed thereon; and the defendant threw down the wall and the post, whereby the kitchen fell in. *Vid.* 65. *Hern* 204.

For making a *sink* so near the plaintiff's house who was a barber, that the defendant who being a shoemaker, therein cast stinking water, which ran into the plaintiff's yard. *Ro. Ent.* 42. *Hern* 180, 208.

Against a *tenant* of a messuage, who permitted stinking water running from a kitchen, to run into the plaintiff's close, whereby his servants and cattle were much infected in their bodies, and became corrupted. 1 *Bro.* 44.

That the plaintiff seized of a messuage and garden, and the defendant possessed of a malt-house near adjoining, converted the malt-house into a brew-house, whereby the plaintiff lost the pleasure of his house and garden. *Vide* 13.

For erecting a shed for melting tallow so near the plaintiff's house, that the plaintiff could not dwell in his house. *Vid.* 11.

That the defendant kept a *lime-kiln*, whereby the herbs, grafs, and fruits of the plaintiff's garden were spoiled and suffocated. *Cl. Man.* 150.

For putting lime into the water, whereby the fish were destroyed. *Cl. Ass.* 274.

For a *lessee* of a messuage, yard and garden, against a butcher, who kept a slaughter-house in a yard, and made a gutter, wherein he cast the blood, filth and dung, which came from the beasts he killed there, and caused it to run into the plaintiff's yard and garden. *Hern* 236.

For a *baker* a lessee of a lower room, against the inhabitants of the upper rooms, who threw down urine and other filth, which fell on the plaintiff's meal and bread. *Ass.* 47.

For a butcher having a shop near to the defendant, who placed dirt so near the plaintiff's meat, that it was endamaged by the dust. *Ass.* 49.

That the plaintiff seized of a garden, enclosed with a brick wall, and the defendant erected a privy joining to the wall, and placed so great a quantity of dirt to the wall, that it fell down, and the filth and soil ran into the plaintiff's garden. *Ass.* 43.

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Trover and Conversion.

- Of goods and chattels. *Vid.* 265. *Cl. Aff.* 200. *Wi. Ent.* 31.
Mo. Intr. 13. 2 *Ven.* 63. *Red. Decl.* 424.
- P *485. For a horse. *Vid.* 8. For a gelding. *Vid.* 266. *Cl. Aff.* 232.
 For a *Ox. *Wi. Ent.* 32, 61. *Trea Tro.* 137. For a cow in an inferior court. *Trea. Tro.* 155. For a silver cup. *Tho.* 32. *Trea. Tro.* 142. *Cl. Aff.* 233. For several pieces of gold and gold rings. *Re. Dec.* 421. For a diamond ring. *Idem* 422. *Ub.* 234. For a hawk reclaimed with bells. *Tho.* 33. *Ub.* 239. *Hern* 104, 143. For woollen cloth. *Ro. Ent.* 69. *Cl. Aff.* 232. For a gold ring 1 *Brown.* 356. For Brazil wood taken in Spain. *Ro. Ent.* 451. For a ship and goods. *Bro. Red.* 69. For a bond. 1 *Brown.* 356. *Trea. Tro.* 142. For a mortgage. *Lill. Ent.* 70. For a bill obligatory, which the defendant had made to the plaintiff. 1 *Brown.* 355. For a leathern bag of money. 1 *Brown.* 356. *Trea. Tro.* 141. For five pounds weight of wool. 2 *Brown.* 358. For monies. *Re. Dec.* 425. For monies which the defendant had craftily got from the plaintiff's wife at cards. *Vid.* 265. *Trea. Tro.* 143. For a stature-merchant. *Ub.* 233. For cattle and chattels. *Hern* 122. *Ra. Ent.* 6. *Hern* 149, 251.
- For an attorney. *Wi. Ent.* 108. Against an attorney. *Ibm.* 99. 1 *Brown.* 356. *Trea. Tro.* 142.
- For an infant by his guardian. *Bro. Met.* 19.
- For an administrator for monies lost by the intestate. 2 *Saund.* 137. 1 *Brown* 1 *Hern* 87. *Tho.* 32. *Mo. Int.* 17, 18.
- For goods lost by the intestate, and which came to the defendant's hands, after the administration granted to the plaintiff. *Tre. Tro.* 148. *Mo.* 17, 18.
- For a bond lost by the intestate, and which came to the defendant's hands after his decease. *Vid.* 265.
- For an executor for cattle lost, and converted in the life of the testator. *Vid.* 264. *Tho.* 31. *Ro. Ent. Int.* 452. *Hern* 122. *Tre. Tro.* 147, 150.
- For an executor, where the goods were lost by the testator, and came to the defendant's hands after the testator's death. *Ro. Ent.* 80. *Mod. Int.* 15. *Tre. Tro.* 145, 152. *Hern* 243.
- That the plaintiff servant to an earl, was possessed of goods which he lost, and they came to the hands of the defendant by his finding them, who sold them; with an averment, that by reason thereof he lost his service. *Mo. Int.* 14.

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For Slandering of a Title.

That the plaintiff was seized of a *manor*, would have demised it, and the defendant said, that the plaintiff had no right thereto; whereupon one *S.* sued out a commission for concealing lands. *Ro. Ent.* 14. 2 *Inst. Cl.* 87. *Hern* 141.

That the plaintiff seized of lands which he agreed to sell to *E.* and the defendant said, that the plaintiff's *title* thereto was not good, whereby *E.* refused to proceed in the purchase. 1 *Brown.* 70.

For slandering the plaintiff's title, whereupon there was an *inquisition* at the suit of the crown, so that the plaintiff could not let his manor. 2 *Mo. Ent.* 25. 2 *Inst. Cl.* 90.

For a son and heir for words of bastardy. *Co. Ent.* 28. *Hern* 41.

The like in the disinheritation of the plaintiff of customary lands, and hindering him from having the administered goods. *Co. Ent.* 29.

That the plaintiff was seized of lands, part of which he could have sold by a feoffment, and the defendant said he had an estate therein by a deed. *Ub.* 116.

That the plaintiff was seized of a manor, part of which was a warren of a 100 acres, which he would have sold; and the defendant said, that one *R.* had a title to one third part therein. *Ub.* 235.

That *T.* seized of a *manor*, of such a yearly value, and clear of all incumbrances, sold it to the plaintiff, who had a discourse with *L.* on the part of *R.* about the sale thereof; and the defendant said, that the estate was imperfect, and that another person had a title, in whose name the defendant entered into the manor. *Raft Ent.* 594.

That the plaintiff was seized of lands for his own life, and the life of others, which he was about to sell to *M.* and the defendant spoke such words that *M.* refused to proceed in the purchase. 3 *Brownl.* 112.

That the plaintiff in right of his wife, was seized of a *manor* and advowson by the feoffment of *R.* who at the time of the feoffment was seized of other lands, whereof by the name of all his lands, &c. he enfeoffed *K.* and others; and the defendant said that *R.* at the time of the last feoffment, was seized of the *manor* and advowson; and that it passed by the general words of the charter of feoffment to *K.* and others; whereby the plaintiff was hindered in an exchange thereof then in agitation. *Raft. Ent.* 594.

That *S.* seized of several *manors* and lands, had covenanted to stand seized to the several uses to his three daughters, one whereof was the plaintiff's wife; and they had a discourse with *D.* about making a lease to him for a term of years for 200 l. and the defendant

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defendant said, that S. had made an estate to another daughter for 1000 years, whereby D. refused to take a lease. *Co. Ent.* 30.

That one T. G. was seized of a manor, clearly discharged from any other title worth 140 l. *per annum*, and T. G. by a deed enrolled, sold the manor to the plaintiff for 3000 l. and that the defendant asserted, that the plaintiff's estate was imperfect by a fraudulent and secret deed having been made to defraud T. G. of that manor, whom the said W. asserted to have the legal estate. *Rash. Ent.* 594.

That the father of the plaintiff seized of several lands, devised part to the plaintiff in tail, and another part to his wife and children for their lives, remainder to the plaintiff in tail; which estate so devised the heir confirmed; and the plaintiff having a wife and children, intended to have provided a jointure for his wife, and portions for his children; and the plaintiff spoke words to depreciate his estate. *Co. Ent.* 35.

For imposing Crimes upon the Plaintiff, or causing him to be indicted.

For charging the plaintiff with felony, and carrying him before a justice of peace in *London*, and there detaining him until he found bail to appear at the next sessions of the peace, where he was discharged by proclamation. *Ro. Ent.* 339. *Vid.* 115. *Hern* 71. *Ra. Ent.* 12.

For one of the king's messengers, for a false and scandalous petition exhibited against him to the justices of the peace of the sessions, and by them delivered to the king's privy council. *Ro. Ent.* 72. *Hern* 153.

For a doctor of laws, and official to the bishop of *L.* for a false and scandalous petition exhibited against him to the committee of parliament. *Vide* 36.

The like for printing and publishing a petition. 1 *Saund.* 120.

For an attorney, for exhibiting false articles against him in the court of chancery; whereupon upon the defendant's oath, a writ issued from the court of king's bench for the plaintiff's good behaviour, and the plaintiff was thereupon arrested. *Ro. Ent.* 75.

For charging the plaintiff with felony before a justice of peace. 1 *Bro.* 76. *Hern* 157.

The like for being accessory to felony. *Tho.* 35.

For a counsellor at law for a scandalous libel. 2 *Brown.* 22.

For an information of perjury in the court of king's bench. *Clift* 25.

The like for an information against the plaintiff, that he riotously was assembled with others, and had unlawfully beat the defendant. *Clift* 27.

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For imposing the crime of felony, and procuring the plaintiff to be indicted upon the defendant's oath; to which the plaintiff pleaded, and was acquitted upon a trial. *Tho.* 43. *Wi. Ent.* 74.

The like for an attorney. *W. Ent.* 74. *Bro. Red.* 12.

For charging the plaintiff, and causing him to be indicted for felony in *Middlesex*. 1 *Bro.* 3. *Re. Dec.* 105, 131. *Clift* 29.

The like at the assizes, and *ignoramus* returned. 2 *Bro.* 17. *Wi. Ent.* 104. *Bro. Va. Me.* 42.

The like for a robbery. *Ro. Ent.* 68. 2 *Mo. Int.* 100. *Han.* 24, 30, 53. *Tho.* 36.

The like for a rape. *Wi. Ent.* 96. *Pl. gen.* 48.

The like for indicting the plaintiff for an assault, and endeavouring to take away the defendant's wife. *Clift* 28.

The like for barrettry. 1 *Brown.* 18. *Bro. Red.* 20, 340.

The like for forgery. *Bro.* 28.

For a parson indicted by the plaintiff at the sessions for sodomy, where the bill was returned *ignoramus*. 2 *Brown.* 21.

For indicting the plaintiff for being a conjurer. 2 *Brown.* 24.

For indicting the plaintiff upon three indictments. 1. For stopping up a highway in an unjust and riotous manner. 2. For unlawfully and forcibly entering into lands. 3. For an unlawful and unjust trespass in lands, and cutting down fences. *Clift* 24.

For indicting the plaintiff for stopping up a common highway. *Clift* 31.

The like for an assault and affray, where *ignoramus* was returned by the grand jury. *Idem* 32.

For pronouncing the plaintiff excommunicated without a reasonable cause. 2 *Brown.* 20.

For exhibiting false bills against the plaintiff, suggesting that he had falsely enrolled pleas in the court of common pleas, and procuring the plaintiff to be often examined thereon. *Raft. Ent.* 13.

*For fixing a scandalous bill against the plaintiff to a church-door. P *487. *Ra. Ent.* 13.

Against abettors in an appeal. *Ra. Ent.* 43, 44.

For arresting the plaintiff in the mayor's court of *Maidstone*. *Lill. Ent.* 23.

For Slander of Persons.

For *scandalum magnatum*. 2 *Bro.* 16. *Vide* 61, 63, 72, 74. *Cl. Man.* 160. 4 *Co.* 13. *Lill. Ent.* 494.

For a duke. *Bro. Red.* 21. 2 *Inst. Cl.* 21.

For words of treason. *Han.* 29. *Cl. Aff.* 221. *Pl. gen.* 17. 2 *Inst. Cl.* 27.

Words of murder and theft. *Pl. gen.* 37. *Re. Dec.* 129. 2 *Inst. Cl.* 29, 53. *Co. Ent.* 23.

Of

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- Of witchcraft. *Han.* 28. *Cl. Man.* 163. *Hern* 112, 122. *Cl. Aff.* 196. *Clift* 106, 107, 108. 2 *Inst. Cl.* 33.
- Of perjury. 1 *Bro.* 23, 63. *Bro. Vad.* 44. *Tho.* 47. *Pl. gen.* 27. *Cl. Aff.* 221.
- The like upon a trial. 2 *Mo. Int.* 18. *Ro. Ent.* 94. *Clift* 102. 2 *Inst. Cl.* 61, 63.
- For words of theft. 2 *Bro.* 26. *Bro. Vad.* 46. 2 *Mo. Int.* 22. *Ro. Ent.* 70. *Han.* 16, 27, 28. *Tho.* 72. *Re. Dec.* 103, 116, 136. *Cl. Aff.* 195. 2 *Inst. Cl.* 44, 49, 55. *Ra. Ent.* 12. *Ub.* 118.
- Of a rape. 2 *Bro.* 19. *Han.* 57. 2 *In. Cl.* 36.
- Of adultery. 2 *Bro.* 18.
- Of forgery. *Tho.* 53. *Bro. Red.* 72. 2 *Mo. Int.* 20. 2 *Inst. Cl.* 66.
- Of barrettry. *Tho.* 57.
- Of words of counterfeiting money. *Tho.* 54.
- Of frauds. *Tho.* 45. *Clift* 111, 112, 116. *Han.* 15. *Cl. Man.* 154. *Re. Dec.* 100.
- Of words of witchcraft. 2 *Mo. Int.* 24. 2 *Int. Cl.* 53, 58.
- Words of slander in *Welsh.* *Hern* 129. 1 *Bro.* 77. *Mo. Ent.* 7.
- For words, charging the plaintiff with having the *French jar*, with an averment of the signification of those words. 2 *Bro.* 6. *Mo. Int.* 26. 2 *Inst. Cl.* 82.
- For words spoken to a riotous assembly, that the plaintiff's house, which was a tavern, was a bawdyhouse, by which the plaintiff's goods were spoiled. *Vide* 44.
- Of perjury, where the defendant had prosecuted the plaintiff for a debt in the county court, where the plaintiff had waged law, and thereupon the defendant said the plaintiff was perjured. *Ro. Ent.* 45. *Hern* 211.
- For words, that the plaintiff had burnt barley. 2 *Inst. Cl.* 42.
- For words spoken of an officer charging him with cozenage in his office. *Wi. Ent.* 70.
- For a judge of the common pleas, and justice of assize, where several malefactors had committed rents and riots in breaking down hedges; and the defendant was examined for abetting them; who said, that the plaintiff gave advice to the tenants to throw down the hedges. *Ro. Ent.* 79. *Bro. Red.* 19. 2 *Inst. Cl.* 70. *Hern* 159.
- For one who had been a member of parliament for saying that he was a papist and pensioner. 2 *Ven.* 263.
- For a justice of peace for words of cozenage. *Tho.* 46. 2 *Mo. Inst.* 30.
- The like for words of bribery. 3 *Brownl.* 113. *Hern* 114.
- The like for forgery. *Tho.* 48.
- For words of injustice. *Ro. Ent.* 65. *Hern* 253.
- For an auditor for words, charging him with cozenage in taking fees. *Wi. Ent.* 70.

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For a counsellor of law against the defendant, who writ and published a scandalous libel against the plaintiff directed to his client.

2 Bro. 22. 1 Saund. 120.

The like for words of subornation of perjury. Tho. 53.

The like for words of maintenance and champerty. Han. 61.

Cl. Man. 166.

The like for words of perjury. Re. Dec. 119. Co. Ent. 26. Hern 111.

For a doctor of physic, that he had killed five persons in bleeding them. 1 Bro. 21.

Of words of a rector of a church, charging him with fornication, and incontinency. 1 Bro. 22.

The like for words of simony. Tho. 50. 2 Mo. Int. 82.

For words of bawdry. Br. R. 70.

For scandalous words of a parson. 1 Bro. 77.

The like for sodomy. 2 Inst. Cl. 37.

The like for words of perjury. Re. Dec. 123.

The like for words of theft. 1 San. 241.

For words of an attorney of the common pleas, for charging him with being an ambidexter, and deceitful in his profession. Tho. 50.

2 Mo. Int. 27. Co. Ent. 23.

The like for words of insufficiency and inability, &c. Tho. 50.

2 Mo. Int. 27.

The like for words of forgery. 1 Bro. 65, 79. Pl. gen. 25,

32, 35.

*The like for knavery and theft. 1 Bro. 79. Han. 26. Hern 111. P*488.

The like for knavery and perjury. 2 Bro. 19. Br. R. 70.

The like for perjury. Clift 104.

The like for bribery. Pl. gen. 30.

For the clerk to a prothonotary for words of theft. Br. R. 51.

For an attorney for scandalous words written in exceptions in chancery. Br. R. 72.

For a virgin, that she had had a bastard. 1 Bro. 49. Cl. Man.

168. Re. Dec. 108, 110. Cl. Aff. 207. 2 Inst. Cl. 78. Hern 110.

Lill. Ent. 61. Ash. 20.

The like for incontinency, by which she lost her marriage. Tho.

45. Ro. Ent. 106. Bro. Va. 47. 2 Mo. Int. 29.

The like of a widow. 1 Bro. 62.

For a widow for words of insufficiency. Han. 11.

For a batchelor, for scandalous words by which he lost his marriage. Tho. 57. Hern 221.

Of a tradesman in London for words charging him to have been in newgate for felony, and should be hanged. 1 Bro. 23.

For words, charging the plaintiff with keeping a deceitful shop-book. Ro. Ent. 46. Hern 212. The like for keeping false weights.

Hern 111.

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- Of a merchant that he was a bankrupt. 1 *Bro.* 63. 2 *Mo. Int.* 34.
Vide 2 *Bro.* 23. 2 *Int. Cl.* 77.
 The like of a mercer. *Ro. Ent.* 77. *Tho.* 51, 52. *Bis* 56. *Mo. Int.* 1. *Cl. Aff.* 198. 1 *Bro.* 78.
 The like of a malster. *Bro. Met.* 35.
 The like for words of cozenage of a taylor. 1 *Bro.* 54.
 The like of a mercer. 1 *Brown.* 78. *Hern* 108, 158.
 The like of an innholder. *Han.* 15.
 For a malster for words of insufficiency. 2 *Bro.* 15. *Br. R.* 83.
 The like of a merchant, 2 *Bro.* 23. *Br. R.* 81.
 The like of a clothworker in *London.* 2 *Inst. Cl.* 74. *Ash* 55.
 For a son and heir for words of bastardy. *Tho.* 58. *Re. Dec.* 127.
 2 *Mo. Int.* 26. 2 *Int. Cl.* 93. *Ash.* 66.
 The like of a daughter and heir. 2 *Bro.* 19. *Han.* 26.
 For a deputy-collector for razing a figure in a book of assessment.
Br. R. 71.
 For a scandalous libel written and published. *Br. R.* 72. 2 *Inst. Cl.* 24, 90, 96.
 For a goldsmith for scandalous words printed and published in the Post-boy, whereby he lost his marriage. *Bro. Met.* 3.

Declarations for Damages done to Horses hired or lent.

- For riding a horse of the plaintiff's (delivered to the defendant to ride) in so furious a manner that he was killed. 1 *Bro.* 40. 2 *Inst. Cl.* 178, 179.
 For a horse lent to the defendant which he so negligently left, that the horse fled, and in leaping ditches became so wounded, that he was killed. *Rob. Ent.* 30.
 In consideration that the plaintiff would lend the defendant a mare for his son to ride on, the defendant promised that his son should not overwork her, but would redeliver her sound, whereas she was killed by being over-wrought. *Bro. Red.* 27.
 For the plaintiff's mare delivered to the defendant to till his lands for two days, and that the defendant so excessively wrought her that she died. *Rob. Ent.* 50, 51.

Declarations for other Wrongs, &c.

- For cancelling a bond delivered to be kept safe for the plaintiff. *Ra. Ent.* 7. *Vet. Int.* 20. *Ub.* 238.
 For tearing the seal off a deed delivered to the defendant to look on. *Ra. Ent.* 7. *Vet. Int.* 163.
 For a haberdasher against one who used too much familiarity with his wife, by kissing and toying with her, so that the plaintiff became

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became scandalized, and hindered in his business in his shop, and injured as to his household affairs. *Ub.* 243.

Against an overseer of the poor, who for 4 s. 6 d. assessed upon the plaintiff distrained his best cow, and sold it to another by covin, for 53 s. 4 d. whereas the plaintiff had several cattle of a less price, and the defendant had not restored to the plaintiff the overplus. *Hern* 233.

For loosening a vessel fastened to a post with a rope, so that the vessel floated in the river, and was much damaged. 213. *Ro. Ent.* 47.

For enticing the plaintiff's apprentice away from his service. *Hern* 78. *Tho.* 33. *Vide* 86. 1 *Brown.* 67. *Vide* 85. 2 *Saund.* 169. 2 *Instr. Cl.* 199. The like of a servant. *Cl. Man.* 73, 171. *Vide* 85. 2 *Instr. Cl.* 201, 202. *Hern* 243.

The like of an apprentice, and to play with the defendant at unlawful games, at which the apprentice lost the plaintiff's money. *Hern* 160.

Against an innholder, who sold the plaintiff's horse which he had at pasture. *Ub.* 231.

*For a lessor against a lessee at will, for burning a cottage by P *489. negligence. *Ash* 56.

For a tenant for life against a tenant at will for cutting down trees. 1 *Brownl.* 255. 1 *Brown.* 28. *Ro. Ent.* 77. *Bro. Red.* 48.

Against the lord of a manor, for cutting down trees on the plaintiff's customary lands, of which he was seized in fee. 1 *Brownl.* 252.

For forging a writing to give the plaintiff trouble in lands which he had bought. *Ra. Ent.* 356.

For a lord of a manor seized of the manor, held of ancient demesne against the defendant, who levied a fine in a superior court, of the tenements held of the manor, whereby the tenements became pleadable at common law, to the disinheritation of the plaintiff. *Bro. Red.* 25.

The like for bailiffs of a borough, and of the ancient vill of G. with a demurrer thereto. *Wi. Ent.* 26.

For a son and heir, for forging a false will tending to his disinheritation. 1 *Brown.* 25.

Against a vicar of a church, for pronouncing the plaintiff excommunicated from coming to church, whereas there was no excommunication. *Tho.* 59. 2 *Brown.* 20.

Against a servant retained to serve the plaintiff as a shepherd for a year, for departing his service within the year, whereby the plaintiff lost ten sheep. *Bro. Red.* 35.

For taking and impounding sheep in a private place, so that by impounding them in a strong place part of the sheep died, and the rest were much damaged. *Ro. Ent.* 87.

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The like for impounding cattle in several places. *Wi. Ent.* 89.
2 *Instr. Cl.* 179.

For prosecuting a writ of *capias utlagatum*, after the outlawry was reversed. *Bro. Red.* 18.

For the citizens of *London* against the mayor, for refusing a poll at an election of a bridgemaister. 2 *Ven.* 25.

For taking away the boundaries of the plaintiff's lands, which divided them from the lands of other people. *Cl. Man.* 176.

For clipping the tails and necks of the plaintiff's horses. *Cl. Man.* 180.

For with-holding and detaining evidences delivered to the defendant to keep. *Cl.* 212.

By a proprietor of a copy of a book, against one who printed it without his consent. *Lill. Ent.* 67.

The like by a patentee. *Idem.* 63.

Against the master of a hoy for sinking the plaintiff's boat. *Lill. Ent.* 38.

Against a *headborough* for billeting soldiers on the plaintiff. *Lill. Ent.* 21.

For keeping a dog accustomed to bite sheep, which bit the plaintiff's sheep, that part of them died, and the rest were damaged. *Ro. Ent.* 77. *Bro. Red.* 43.

The like of a dog accustomed to bite men. 1 *Brown.* 29. 1 *test. Cl.* 197, 198.

The like for biting a horse. *Ro. Ent.* 20. *Hern* 249.

The like for keeping a boar that was used to biting. *Bro. Red.* 47, 73.

The like for keeping a mischievous heifer. *Tho.* 40.

Declarations in Actions upon the Case, for the Defendant's not doing somewhat he ought to do, either by the Law, or the Customs of the Kingdom, or by his Promise Express or Implied.

For a customary tenant of a mill, against the occupier of tennements, who by custom ought to grind his grain at the plaintiff's mill. 1 *Brown* 68. *Bro. Red.* 63. *Hern* 83.

For a bishop's tenant of four customary mills, against an inhabitant of an ancient messuage, where all the inhabitants in the city of *S.* ought to grind their corn at the said mills. *Wi. Ent.* 66.

For two proprietors of mills, against the tenant of a messuage within a manor, where, by the custom of the manor, every inhabitant within that manor ought to grind their corn at the said mills. 2 *San.* 112.

The like for a tenant at will of seven mills in a manor, and a borough, against the inhabitants of an ancient messuage within that manor and borough, 2 *Ven.* 288. an action upon the case brought by

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by two upon a prescription, for not grinding all their corn at one of their mills; but the declaration ill, because they had not said all their corn which they had to grind. 2 *San.* 113.

Against a vicar, for neglecting to read divine service in the chapel of a lord of a manor. 5 *Co.* 72. *Ra. Ent.* 2.

For not performing an agreement as to cleaning the court belonging to a house called the mews, and carrying away the dung and filth from the same. *Re. Dec.* 11.

*Against an attorney, who had not sued out a *feri facias* upon a judgment confessed by a warrant of attorney. *Re. Dec.* 33. P *490.

For not paying *E. D.* monies due for feeding cattle sold the plaintiff by the defendant. *Cl. Aff.* 208. *Clift* 65. *Cl. Man.* 114

For not delivering monies delivered to the defendant by the plaintiff, to be delivered to *J. S.* *Cl. Aff.* 209.

For not repairing a messuage. *Ro. Ent.* 10.

For not paying rent, in consideration of a distress left by the plaintiff upon the premises. *Bro. Red.* 120. 2 *Inst. Cl.* 120, 122.

For not delivering the possession at the end of a term according to a promise. *Clift* 40. *Re. Dec.* 5.

For taking away sheep (that were sold to the defendant) out of the pasture of the vendor, according to an agreement. *Clift* 65.

For not repairing a barn according to a promise upon an exchange of the barn of the defendant for the plaintiff's barn. *Clift* 74.

For a farmer of tithes against an occupier of lands, where, by the custom of the vill, all the occupiers of lands ought to carry their tithes to a barn, called the tithe-barn. *Tho.* 74.

For a farmer of lands, where by a prescription all the farmers of such a farm, had the liberty of a fold-course within the common fields in *G.* from such a day to such a day, feeding upon the lands of the farm; and the defendant put in 200 sheep there to depasture, but did not fold them as he ought upon the lands, whereby the plaintiff lost the benefit of the foldage. 2 *Ven.* 136.

For not plowing lands according to an agreement. *Clift* 63.

For not performing an agreement about building an house. 2 *Saund.* 347. 2 *Inst. Cl.* 106, 108, 111.

For not redelivering a horse left with the defendant to depasture. *Cl. Man.* 77.

BARS OR PLEAS.

To Actions upon Promises.

Non assumpsit. 1 *Bro.* 67. 2 *Bro.* 9. *Mo. Int.* 27, 28. *Han.* 35, 59. *Cl. Aff.* 71. *Lill Ent.* 56, 57.

Non assumpsit to part, and a tender to the rest. 2 *Mo. Int.* 143.

Replication and issue. *Ibid.*

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Non assumpsit by an executor. *Bro. Vad.* 74, 113.

To the first promise *non assumpsit*, to the second and third *non assumpsit*, within six years. *Bro. Vad.* 74, 113.

Non assumpsit within six years by an executor setting forth the time of suing out the original, replication and issue. 2 *Mo. Int.* 138. *Cl. Ass.* 115.

A special replication, that the plaintiff sued out a *latita*, and that the cause of action accrued within six years before. *Mo. Int.* 138.

An *Alias latitat* sued out, with several continuances. *Id.* 140.

The statute of limitations pleaded at large. *Id.* 142. the like, *Cl. Ass.* 181. the like, *Br. R.* 99. replication thereto. *Id.* 104.

A plea, alledging by *protestation*, that he had not accounted, nor was indebted, for plea, *non assumpsit Pl. gen.* 58.

To part *non assumpsit*, and to the residue a tender of money brought into court; replication, denying the tender. *Tho.* 60, 66. *Br. Red.* 90. the like, *Cl. Ass.* 104.

As to one promise *non assumpsit*, and to the other that he had paid part, and a tender to the residue brought into court. *Br. R.* 90, 107, &c.

Payment as to part, and a tender as to the residue, and the money brought into court. *Bro. Vad.* 103. *Cl. Ass.* 140.

That an agreement was made upon a condition, and a traverse of the agreement in the declaration; replication maintaining the declaration, and an issue upon the traverse. *Tho.* 74.

That the bargain made was upon a condition, that the plaintiff was to pay money at such a feast, which he had not paid; replication, that the bargain was made without a condition, and a traverse, that it was upon a condition. *Br. R.* 90.

That the defendant promised upon such a condition, and a traverse of the promise in the declaration, and a replication and issue upon the promise in the declaration. *Ro. Ent.* 97.

That the plaintiff had discharged the defendant of the promise. *Clift* 199.

That he had left the premises in as good repair as they were at the time of the agreement, and an issue thereupon. *Han.* 41.

That he had paid the money according to the promise; replication, that he had not paid. *Mo. Int.* 29. the like, 2 *Bro.* 6.

P* 491. *To a promise to pay the loss sustained by carrying away wood; a plea, that the defendant offered to pay 26s. which was a sufficient recompence; replication, protesting that he did not offer for plea, that it was not a sufficient recompence. 1 *Bro.* 37.

To the last promise *non assumpsit*, and to the first a *demurrer*. 3 *Lev. Rep.* 149.

To the second promise *non assumpsit*, and to the first a special Plea. *Id.* 317.

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The defendant pleads *non assumpsit* to part, and a *foreign attachment*, in *London*, as to the residue; *replication*, that those bonds attached were made in *S.* and not in *London*; *rejoinder*, that one of the bonds was made in *London*, and judgment for the plaintiff. *Lev. Ent. 2.*

Plea by a release to a declaration for lodging. *Cl. Ass. 257.*

The defendant pleads a general release made after verdict, and before judgment. *Bro. Vad. 115.*

As to part, that he gave a bond, and as to the residue *non assumpsit*. *Cl. Ass. 101.*

A *plea*, confessing the promise, but for a defence, payment and acceptance after the last continuance. *Clift 203.*

That the plaintiff accepted a promise of payment of the money from another person, and that he discharged the defendant therefrom; *replication* protesting, &c. for *plea*, that he did not discharge the defendant. *Mo. Int. 30.*

That the defendant such a day, paid the plaintiff 10*l.* in full satisfaction of all debts and demands which the plaintiff received, and a traverse of any promise afterwards; *replication*, that he had not paid, and any promise afterwards; two issues. *Br. R. 93.*

To an *indebitatus assumpsit* the defendant pleads, that the plaintiff was a recusant convict, &c. with an averment, that the judgment and record are in force; the plaintiff *demurs*. *Lev. Ent. 11.*
The like, 3 *Lev. Rep. 4.*

To an *indebitatus assumpsit* by commissioners of bankrupts; the defendant pleads *non assumpsit*, to which there is an issue, and thereupon a special verdict is found. *Lev. Ent. 15.*

To an *assumpsit* for wares, and a *mutuatus* for money had and received, *non assumpsit* as to several parcels of the money, and a tender, before the writ purchased, as to the rest, which the plaintiff refused, and that the defendant is still ready; *replication* denying the tender before the plaintiff brought his original; to which the defendant *demurs*. *Il. 30. Br. R. 107.*

The defendant pleads *non assumpsit* within six years; *replication*, that the monies were due and payable upon a traffick, between the plaintiff and the defendant as merchants; but ill in *assumpsit*; otherwise in the case of an account. 2 *San. 123.*

That the defendant had paid his moiety of the bargain between him and the plaintiff, for goods bought by them jointly according to his promise; *replication* that he had not paid, and an issue thereupon. *Re. Dec. 50.*

To an action upon several promises; the defendant pleads payment of 5*s.* in full satisfaction of all promises, from the beginning of the world to that day. *Bro. Vad. 93.*

1. As to money borrowed *non assumpsit*.
2. As to money due for cattle an account stated.
3. As to other money due for cattle,

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Ec. that they were partners in all bargains, *Ec. Id.* 94. replication and issue.

To an *indebitatus assumpsit* for 6l. for a gelding; the defendant pleads, he bought the gelding, upon a condition that the plaintiff upon request, should by note under his hand promise to repay the defendant the said 6l. if any person should claim a property; and avers, that he offered the 6l. and the plaintiff refused to subscribe a note. *Id.* 95. replication and issue.

To an *assumpsit* for money borrowed, the defendant pleads, that D. L. being indebted to him in 20l. by the plaintiff's direction paid the same to E. J. the plaintiff's brother, *Ec.* a replication and a demurrer, and judgment for the plaintiff. *Id.* 97.

As to the first, second and third promises that he made them on the 10th of April, and that the plaintiff sealed a general release to him on the 11th with a traverse of an *assumpsit*, afterwards a replication, that the defendant promised after the 10th day, and an issue. *Id.* 98, 105, 111.

The defendant, as to the 2d, 3d, 6th, and 7th promises, pleads *non assumpsit*; and as to the 1st promise he pleads the statute of gaming: And as to the 4th promise, that he lost above one hundred pounds to the plaintiff at hazard: And as to the 5th promise, that it is true he made such promise, but further that he paid, and
P * 492. lost above the sum * of one hundred pounds not then paid by him; a replication as to the first promise by way of protestation, that they did not play, *Ec.* for plea, that the note and bill were made for money lent to the defendant, and a traverse, that he lost above one hundred pounds at one time; and as to the fourth, that he got only 61l. and no more; as to fifth, that he got 61l. and no more. *Clift* 200, 201.

As to the first second and third promises, the defendant pleads *non assumpsit*; and as to the other he pleads, that he paid the money according to his promise. *Bro. Va. Me.* 99. replication, that he had not paid, and an issue, the like replication and issue. *Id.* 102.

To the first promise, the defendant confesseth judgment by *non informatus*, and as to the other he pleads *non assumpsit*. 103.

To the first promise, the defendant accounted, and 10l. was due, which he brings into court. 2 *Mo. Int.* 243.

To the first promise *non assumpsit*, to the second, that the plaintiff delivered the goods by agreement to the defendant in the name of a third person, for and in satisfaction of money due to him by the said third person. 3 *Inst. Cl.* 269.

The defendant pleads a special letter of licence to an action upon the case brought upon a promise. *Id.* 273. the like. *Han.* 62.

Non assumpsit to the first, and to the second he pleads, that he paid so much money, and gave so many goods in satisfaction. *Han.* 64.

Non assumpsit for one defendant, *nil dicit* for the other. *Cl. Aff.* 84.

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Plea of nonage to an *assumpsit*, for merchandizes bought by the defendant; *replication*, that they were for necessary apparel, &c. for the defendant and his wife; *rejoinder*, that they were not for necessities, &c. *Br. R.* 95.

The like to an action brought by a taylor, and an *issue* thereupon. *Id.* 104.

As to the first and second promises *non assumpsit* within six years; as to the third and fourth *non assumpsit* generally; a *replication* as to the first and second by an original in trespasses sued forth within six years, &c. and that he promised within six years next before the original, and hath it; and pleads that the writ will not warrant the declaration, to which the plaintiff *demurs*, and the defendant joins in *demurrer*. *2 Ven.* 255.

That the defendant paid another so much for the plaintiff in full satisfaction, &c. *Cl. Ass.* 91.

That the defendant paid the money in the declaration mentioned, before the day of the original, and the plaintiff gave a release thereupon. *Cl. Ass.* 129.

One defendant pleaded, that he together with the other *non assumpsit*, and the other defendant pleaded, that the plaintiff appointed one *P. B.* to receive 30l. in full satisfaction of the promise, &c. *Id.* 138.

Payment pleaded. *3 Brownl.* 82. *Hern* 130, 135.

Payment at several days pleaded. *3 Brownl.* 56.

To an action upon a promise to become bound to the plaintiff for money to be paid at the end of the year, or to pay so much upon demand; a *plea*, that the defendant and another offered to seal and deliver a bond, &c. which the plaintiff refused to accept; *replication*, that the plaintiff requested the defendant to pay him the money which the defendant was to pay upon request. *3 Brownl.* 75.

A plea, as to the first promise payment; as to the second promise acceptance of another note in satisfaction. *Lill. Ent.* 121.

In a feigned issue, as to the first promise, that the plaintiff had paid more than he had received; as to the second, that the intestate was not indebted to the plaintiff. *Lill. Ent.* 48, 66.

The statute of the 10th of queen *Anne*, pleaded in discharge of the defendant's person only being a prisoner; *replication*, that he was not a true prisoner, and a traverse of his discharge. *Lill. Ent.* 108.

Non assumpsit, within six years from suing out the original. *Lill. Ent.* 478. The like from suing out a *Bill. lbm.*

Three defendants; to plead *non assumpsit*, and the third, with the leave of the court pleads *non assumpsit*, and *bankruptcy*. *Lill. Ent.* 106.

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Pleas to Actions brought by Executors or Administrators.

That the defendant never was executor, and a *replication*. *Cl. Aff.* 74. *Han.* 105.

Non assumpsit within six years by an executor, with a *replication* and an *issue*. 2 *Mo. Int.* 138. the like. *Cl. Aff.* 95.

P *493. *The defendant pleads, that the testator gave him orders to sell the cloth, which he did accordingly, and paid the money to the testator in his life-time. *Bro. Va. Me.* 88.

The defendant pleads, that after the testator's death, and after the marriage of the plaintiff *T. R.* and *A.* his wife, he accounted with the said *T. R.* and was found in arrear 40s. which he paid, and the same was received in full of all demands, &c. *replication*, protesting that he had not accounted, for *plea*, that he had not paid, and an *issue*. *Id.* 100.

That the defendant, and the intestate did account, and thereupon it did appear, that he did not owe one penny to the intestate; *replication*, that he did not account, and an *issue*. *Id.* 102.

The defendant protesting that he made no such promise, for *plea* that he paid 10l. 5s. to the intestate in his life-time in full satisfaction; a *replication* that he had not paid it, and an *issue*. *Id.* 109.

The defendant pleads a *release* from the plaintiff as one of the executors, &c. and of money due to the testator upon a promise; *replication*, that it is not his need, and an *issue*. *Id.* 116.

The defendant pleads, that the testator had accounted with him in his life-time, and the defendant was found in arrear in 12l. that afterwards he paid 10l. and the other 40s. he offered to the executor. 3 *Inst. Cl.* 277. *Replication*, protesting that he had not paid, nor offered, &c. for *plea*, that he made such promise *prout*, and a traverse of the account. A *rejoinder*, that he accounted *modo & forma*, and an *issue*. *Id.* 279.

That administration never was granted to the plaintiff. *Cl. Aff.* 17. A *Replication* and an *issue*. The like. *Han.* 105.

That the testator paid the plaintiff 20l. in satisfaction of the promise, &c. *Id.* 131.

One executor pleaded *Plene Administravit*, and the other pleaded a renouncing of the *probate* of the will; and that no effects had come to his hands to be administered. *Id.* 132.

Pleas by Executors and Administrators.

Plene administravit. 1 *Bro.* 17. *Han.* 44. *Bro. Va. Me.* 116.

That the testator *non assumpsit*, a verdict and judgment thereon against the executor. *Ro. Ent.* 64.

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on Actions on the Case.

Plene administravit by an executor ; *replication* and an *issue*. *Bro. Met.* 18.

Non Assumpsit by executors and administrators. *Bro. Va. Me.* 57.

To an action for sheep sold by the testator ; a *plea*, that the testator and the defendant had accounted ; upon which the defendant was found in arrear 8l. and the defendant afterwards paid 7l. thereof, and offered the other to the executor ; *Replication*, protesting that he had not paid, nor offered, &c. for *plea* maintaining the declaration, and a *traverse*, that he the defendant had accounted with the testator, *rejoinder*, that he had accounted. 1 *Bro.* 14.

That the intestate was indebted upon a bond to R. in 20l. and in 30l. to H. for rent unpaid at the time of his death ; and that he hath not any goods, besides, &c. *Vid.* 45.

To an action against an administrator as to part, that the intestate in his life-time paid it ; and as to the residue, that the defendant had paid the plaintiff 10l. in full satisfaction of the promise ; *replication*, that the intestate had not paid the part, and that the defendant had not paid the residue, two issues. *Br. R.* 92.

A plea of a judgment in debt in the king's bench upon a bond against the administrator ; that the intestate was indebted upon three separate bonds in so much, and that he had not effects besides, &c. *Replication*, as to the judgment, that the defendant after the judgment had paid 50l. in full satisfaction of the judgment ; and that the judgment remained undischarged by fraud ; and as to the several bonds, that the defendant had paid several sums in full satisfaction of the debts ; and that the bonds remained uncanceled by fraud : *Rejoinder*, that the judgment remained in its full force, and *traverses* the fraud, and that the several bonds were not paid or discharged, and a *traverse* of the fraud, and an *issue* thereupon. *Br. R.* 55.

The defendant pleads in *bar* that the plaintiff brought his action against the testator in the sheriff's court, and had a *verdict* there, and judgment thereupon, &c. with an *averment* of identities. *Bro. Va. M.* 76. *Replication*, that the recovery was for 8l. 8s. in which the testator was indebted to him for wine, and a *traverse* of the identity 87. the defendant takes an *issue* upon the *traverse*, a verdict and judgment for the plaintiff. 88.

**Non assumpsit infra sex Annos*, before the day of suing out the original, pleaded to an action upon the case brought by an administrator, and that administration was granted such a day. *Lill. En.* 471. P *494.

A plea by an administratrix, that her intestate was indebted upon a bond to J. S. and also by a judgment recovered in the king's bench against the administratrix in a simple contract by the intestate, and that she hath not assets *ultra*. *Lill. Ent.* 59.

An administrator pleaded payment of part in the intestate's lifetime and part by himself after intestate's death. *Cl. Aff.* 148. *replication*, that he had not paid, and an *issue*.

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Plene Administravit, &c. Cl. Aff. 166, 167. *Han.* 195.

Nil dicit by one executor defendant, and the other pleads that he never was executor. *Cl. Aff.* 174.

That he never was executor pleaded by one, and judgment by *non inform'* by the other. *Id.* 177.

That he never was executor by one, and *Plene Administravit* by the other. *Han.* 119.

To Declarations for Goods sold and delivered.

To an action for wares sold; a *plea* of nonage; a *Replication*, that the wares delivered were for necessary apparel, to which the defendant *rejoined* that they were not sold for necessary apparel, and a *demurrer* thereupon. 2 *Bro.* 29.

The like plea, replication, rejoinder and issue. *Bro. R.* 93, 104. *Vid.* 40.

To an action brought for cattle sold; The defendant *pleads* that he paid for two of the oxen, that he was ready to have paid the plaintiff for the cow, if he would have delivered her; and a *traverse*, that the plaintiff offered to deliver the cow; *Replication*, protesting, &c. *For plea*, that he offered to deliver him the cow. *Bro. Red.* 93. 3 *Inst. Cl.* 270.

The defendant *pleads*, that the plaintiff accepted of a beaver hat in discharge of the promise; *Replication*, that he had not delivered it, and an *issue* thereon. *Bro. Va. M.* 92.

Vide bars to actions by executors and administrators.

To Actions brought for the not Delivery of somewhat to the plaintiff.

To an action for not delivering goods; a *plea* of *non assumpsit* to part; and as to the residue that he had delivered to one C. by the appointment of the plaintiff; *Replication*, that he delivered it not by his appointment. *Pl. gen.* 62.

To an action for the not delivery of barley at such a feast; a *plea*, that the plaintiff before such a feast had discharged the defendant from his promise; *Replication*, that he had not discharged him from his promise. 1 *Bro.* 67.

The defendant *pleads* that he paid part of the money, and would have paid the rest if the plaintiff would deliver the cattle to him according to his contract; *Replication*, protesting that he had not paid; for *plea*, that he had offered to deliver, and an *issue*. *Bro. Va. M.* 107.

The defendant *pleaded*, that the plaintiff had pawned the satchel till he should pay the defendant 10l. *Cl. Aff.* 95. *Han.* 109. That

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That the horse was so sick that he could not deliver it to the plaintiff. *Cl. Ass.* 102.

To Actions for Money had and received.

The defendant confessed the declaration, and pleaded that he had paid the several sums of money to *W.* to the use of the plaintiff; *Replication*, that he had not paid, *Sc.* 2 *Bro.* 6.

To an action brought by a servant. The defendant confessed, that the plaintiff came into the testator's service, and there continued till such a time, during which the testator had plentifully provided for the plaintiff; and that on such a day the plaintiff voluntarily left the testator's service; and a *traverse*, that the plaintiff served the testator during the whole time in the declaration; a special *demurrer*, and judgment for the plaintiff. 1 *Saund.* 265.

To Actions upon Promises relating to Lands.

To an *assumpsit* *Bro. R.* 17. *Wi. Ent.* 74.

Non assumpsit to pay 28l. 12s. 6d. in consideration that the defendant should occupy the third of 223 acres, *Sc.* defendant pleads payment and acceptance; *Replication*, that he had not paid, an *issue* thereon. *Bro. Va. Me.* 92.

*The defendant *protesting* that he made no such promise; for *plea*, P *495. that he did pay all weekly assessments and payments, whatsoever chargeable upon the said tenements; *Replication*, that he did not pay, *Sc.* and *issue*. *Id.* 107.

To an action for plowing, *Sc.* The defendant pleads he paid 22s. in discharge of all plowing, *Sc.* *Replication*, protesting that the defendant did not pay, for *plea*, that the plaintiff did not receive it in full satisfaction, and *issue*. *Id.* 110.

To a declaration, that the defendant in consideration of a surrender of a term in the plaintiff's shop, would put the plaintiff into a shop of the defendant's; a *plea* that the defendant offered to put the plaintiff into a shop, which he refused. 3 *Instr. Cl.* 279.

To an action upon a promise to convey lands; a *Plea*, that within the time the plaintiff discharged the defendant from the promise; whereupon he sold the lands to another; *Replication*, that he did not discharge him. *Ra. Ent.* 685.

To Actions brought for Work and Labour.

To an action upon an *assumpsit* to pay 100s. *Sc.* the defendant pleads, that the plaintiff was not ready to go to the kingdom of
Scotland,

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Scotland, but refused ; *Replication*, mainting the declaration, and a *traverse*, that he refused, and an issue thereupon. 1 *Bro.* 76.

To an *assumpsit* by a *Taylor* ; the defendant *pleads* nonage ; *Replication*, that the garments were necessary ; *Rejoinder* that they were not, and issue. *Vid.* 40. *Bro. Red.* 104.

To Actions brought for the Non-Performance of Awards.

The defendant confesseth the submission and award, but *pleads* that the plaintiff was indebted to the defendant in 4l. whereof the arbitrators had notice before they made their award, but would make the plaintiff no allowance for the same : A *demurrer* and *judgment* for the defendant for a fault in the declaration. 1 *Saund.* 30.

Non assumpsit, and a verdict for the plaintiff. *Wi. Ent.* 471.

To part the defendant *pleads*, that he paid the money according to the purport of the award ; to the residue, the defendant *pleads* a release ; a *Replication*, that the defendant did not pay, &c. and an issue thereon. *Mo. Int.* 57.

Pleading by way of *protestation*, that the arbitrators made no award for a *defence*, that no award was delivered, or ready to be delivered according to the submission ; *Replication*, that the award was made, and ready to be delivered under the hand and seal of the arbitrator, an issue thereupon. *Mo. Int.* 58.

To an Action for Attornies Fees.

Non assumpsit. 2 *Brownl.* 8.

That the defendant paid all the sums for prosecuting, and for the monies expended ; *Replication*, that he had not paid, and an issue. *Ro. Ent.* 56.

That the defendant was retained to be attorney for the plaintiff in all actions brought against him ; *Replication*, protesting, &c. for plea, that he did not require the defendant to appear as attorney for the plaintiff ; *Rejoinder*, that he did require him. 1 *Bro.* 33.

That he paid the plaintiff 40s. which was as much as he owed him, and a *traverse* of the promise ; *Replication*, protesting that he had not paid ; for plea, that he promised *modo & forma*, and an issue. *Bro. Va. Me.* 108.

To Actions brought against Attornies.

To an action against an attorney, that he appeared without a warrant ; the defendant *pleads*, that judgment passed against the plaintiff

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plaintiff by *non inform'* for want of instructions given by the plaintiff. *Cl. Aff.* 289. The plaintiff demurs, and the defendant joined in demurrer, the like. *3 Inst. Cl.* 369. *Replication*, protesting that he did not retain, for plea, that he did not require the defendant to appear; *Rejoinder* and *issue*, that he did not retain, &c.

To an action against an attorney for acknowledging satisfaction without a warrant; the defendant *pleaded*, that the plaintiff retained him to acknowledge satisfaction; *Replication*, that he did not retain, &c. and *issue*. *Id.* 372.

To an action for cancelling a bill obligatory; the defendant *pleads*, that he delivered it as an acquittance to be cancelled: A *Replication*, that he delivered it to be safely kept, and an *issue*. *3 Inst. Cl.* 375.

The defendant pleads a retainer by a stranger to appear for the P * 496. plaintiff, and he thereupon appeared; and for want of instructions, he pleaded that he was not instructed. *Ro. Ent.* 18, 19. *Replication* that the defendant was not retained. *Ro. Ent.* 20.

To Actions brought against Sheriffs, &c. for Escapes.

The defendant pleaded a rescue in carrying his prisoner to gaol; held a good plea, although the rescue was not returned. *3 Lev. Re.* 44.

The marshal pleads fresh pursuit to an action for an escape; *replication*, rejoinder and *issue*. *2 Mo. Int.* 145.

The sheriff to an action for an escape, pleads the statute of *Hen. 6.* concerning sheriffs taking bail. *Id.* 151, 188, 190. The like, *Bro. Red.* 96. and *Replication*, that the bail had not sufficient in the county where the writ issued.

The defendant protesting that the writ was not sued out, and delivered, for a plea, that the party supposed to escape was not taken and arrested, and *issue*. *3 Inst. Cl.* 354.

The defendant pleads, that the justices of the peace in their quarter sessions, granted a *habeas corpus* to bring the party arrested before them, and that writ being returned, the said justices discharged him. *Id.* 355.

The sheriff pleaded, that *N.* and *M.* had wasted according to the return. *Id.* 376.

The defendant alledging by *protestation*, that they did proceed upon the writs of *procedendo* with all speed; for defence they pleaded, that the three writs were not, nor either of them was delivered to the plaintiff declared; *Replication*, maintaining the delivery, and an *issue* thereupon. *Idem Ibidem.*

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Pleas to Actions brought for Escapes.

That he did not permit him to go at large. *Cl. Aff.* 83.

The defendant pleaded a licence to discharge the prisoner; *Replication* maintaining the declaration, and an issue. *Ro. Ent.* 309.

The defendants to the escape pleaded, that they took bail for the appearance of the party. *Ro. Ent.* 309.

To an action of escape, the defendant *pleads*, that the defendant as sheriff took sufficient security of the prisoner, according to the statute for taking bail; and a traverse, that he suffered the prisoner to escape, before he had taken such sufficient security; *Replication*, that the defendant before the taking security, had notice that the writ of *Latitat* was sued out for the recovery of a debt of 80*l.* *Th.* 64. *Bro. Red.* 96. *Ro. Ent.* 309.

To a declaration against a bailiff of a liberty for an escape, he *pleads* that he had not taken, or arrested the party. *Ro. Ent.* 87.

To an action against the deputy marshal, brought by husband and wife; a *plea*, that the wife, with the consent of the husband, directed the defendant to let the prisoner go at large. *Ro. Ent.* 30.

To an Action upon a Promise of Indemnity.

The defendant *pleads*, that he became bound with the plaintiff to the sheriff, who in default of the appearance of the plaintiff, proceeded to an *exigent* against the plaintiff and his bail in the common pleas; and the defendant received the monies to give the attorney to supersede the *exigent*, and for his journies and expences; and a *traverse* that he promised to indemnify the plaintiff with an issue upon the *traverse*. *Ro. Ent.* 93.

That the plaintiff was not damnified. *Han.* 118.

To Actions upon Promises relating to Marriages.

To an *assumpsit* to pay money in consideration of marriage; a plea, that the plaintiff after the promise made discharged the defendant by a release in writing; *Replication*, that it is not his deed; and an issue. *Han.* 43.

The defendant *pleads*, that he offered to marry the plaintiff, which she refused. *Bro. Va. M.* 90. *Replication*, that she did not refuse, rejoinder and issue that she did.

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To Actions for Meat, Drink, &c.

Non Assumpsit. Bro. Red. 30.

The defendant *pleads* a tender of 10s. for diet and lodging, as being sufficient for the same, which the plaintiff refused, &c. *Bro. Va. Me. 89.*

*The first defendant confesseth judgment by *nil dic'*; the other P *497. pleads as to the giving 10l. *non assumpsit*, and as to giving the plaintiff A. her diet, &c. that he gave it her part of the time, and was ready to have done so for the remainder; but that the plaintiff took his wife from his house, whereby he could not perform his promise; *replication*, protesting that he did not take her away; for plea that the defendant did not give her diet, &c. and an *issue. Id. 112.*

A plea, that as to such a day *non assumpsit*, and that afterwards the wife absented herself contrary to the will of the defendant; and the defendant thereupon gave notice to all persons, that he would not pay any sum, &c. 3 *Instr. Cl. 272.* The like, *Br. Br. 95.* The like, 96.

A plea to an action upon a promise of marriage, that the defendant promised upon condition, that a jointure was made, and a traverse of the promise in the declaration. *Hern 228.*

To Actions brought for Money due for curing Diseases.

That the plaintiff negligently managed the wound, and by unskillfully administering medicines, the wound became mortified, and the plaintiff said he could do no more to it than he had done; whereupon the defendant paid the plaintiff 40s. which he accepted of, and a *traverse* of his deserving more. 3 *Instr. Cl. 349.*

To an action for money promised for the cure of a wound; a *plea*, that the wound was not cured by means of the plaintiff. *Hern 229.*

To Actions relating to Things Mercatorial.

That the defendant paid the money due upon the bill of exchange, according to the tenor of the bill; a *replication*, that he did not pay, &c. and an *issue* thereupon. *Tho. 66. 2 Mo. Int. 161.*

To a declaration for money due upon a protested bill of exchange; a *plea*, that the plaintiff and defendant submitted themselves to the award of arbitrators, who made their award, that the defendant should pay the plaintiff 700l. which he paid, with an averment, that the sum in the declaration was included in the 700l. a *replication*, that it was not included. *Han. 45.*

To

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To a like declaration ; a *plea*, protesting, &c. for *plea*, that the defendant is heir apparent to *T.* and for his better education, he was at *Paris* as an *English* gentleman, and a *traverse*, that he was ever a merchant, or a person trading in merchandizes, &c. a demurrer thereto. 2 *Ven.* 294.

To the like declaration ; a *plea*, protesting, &c. for *plea*, that he drew the bill of exchange as in the declaration, for the use of *C.* who being indebted to the king in the said 200*l.* the bill was seized into the king's hands ; and the defendant, by virtue of a writ of extent, paid the money to the king in full satisfaction of the bill of exchange, with proper averments, and a special demurrer thereto. 2 *Ven.* 300.

As to the second promise *non assumpsit* ; as to the first, that the plaintiff endorsed the bill to one *A. D.* and the defendant paid the money to *A. D.* and *A. D.* gave a receipt, and an acquittance in writing. *Clift* 928.

Pleas to Actions upon Warranties.

That the defendant did not warrant: 1 *Brownl.* 39. *Clift* 939. *Bro. Red.* 95. with a *traverse*.

Pleas to Actions for Negligence, or for Misfeasance.

To an action for misusing a horse in a journey ; the defendant *pleads*, that the horse died of several distempers, and a *traverse*, that the horse was killed by hard riding ; an issue upon the *traverse*. 1 *Brownl.* 40. 3 *Instr. Cl.* 350. The like with a *traverse* of overloading the horse. *Ro. Ent.* 51.

To an action for unskilfully shaving the plaintiff ; the defendant *pleads* that he did not shave, &c. 3 *Instr.* 309.

That the defendant did till the ground in a husband-like manner, with a *traverse* of the negligence, and an issue upon the *traverse*. 2 *Brownl.* 73. 3 *Instr. Cl.* 353.

P * 498. Taking a *protestation* the defendant *pleads*, that the goods were by * a misfortune burnt in an inn upon the road, and not by negligence of the defendant ; a special *demurrer* thereto. *Wi. Ent.* 29.

To a declaration for goods lost by a common waterman ; the defendant *pleads*, that the boat, with goods therein sunk by a tempest, without any negligence of the defendant ; and a *traverse*, that they were lost for want of care. *Vid.* 3. 38 *Bro. Red.* 101. 2 *Mo. Int.* 95. 3 *Instr. Cl.* 303. *Cl. Ass.* 99.

That the waggon laden with the cloaths and other things, was broken open in an inn upon the road, and those cloaths and other things

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things that were in the waggon were feloniously taken away against the defendant's consent ; and a *traverse*, that he undertook to carry the cloaths safely. *Ro. Ent.* 30. 3 *Instr. Cl.* 345. *Bro. Red.* 16.

That a stranger unknown fired the houses joining to the plaintiff's houses ; and a *traverse* of a neglect in the defendant in guarding his fire. 3 *Instr. Cl.* 337.

A *plea*, that goods were not burnt for want of due care of fire. *Ibm.*

A *plea*, that the defendant took proper care of his fire ; a *replication* and *issue* upon the want of care. 3 *Instr. Cl.* 338.

Pleas to Actions for Disturbances of Common.

A *plea*, that the *common* was the freehold of E. and J. who gave the defendant leave to put in his cattle ; and a *traverse* of the prescription. *Bro. Red.* 45.

That the defendant had *common* appurtenant in the place, &c. for all commonable cattle throughout the whole year, as a customary tenant by the custom of the manor, and in the plaintiff's lands by reason of vicinage. *Tho.* 63. 3 *Instr. Cl.* 326.

To a declaration for chasing the plaintiff's cattle ; a *plea*, that W. seised of the manor whereof, &c. devised it to the plaintiff for life, who drove out the cattle *damage-fezant* ; and a *traverse* of the prescription. *Ro. Ent.* 62.

A justification for impounding an horse. *Cl. Aff.* 93.

To a declaration for surcharging of common ; a *plea*, that before the plaintiff had any thing in the messuage, one J. was seised, as well of that messuage and lands, as of a pasture in fee, whose estate. *Ro. Ent.* 42.

To a declaration for surcharging common ; the defendant *pleads*, that he is a commoner, and justifies putting in his sheep. 3 *Instr. Cl.* 334.

To a declaration for inclosing common ; a *plea*, that the plaintiff's father gave H. leave to inclose part of the common ; and the defendant as his servant did inclose it, and kept up the inclosure. *Wi. Ent.* 77.

To the like declaration ; a *plea*, that there is a custom for the tenants in fee to inclose the lands in the fields, and to keep them separate ; *replication*, that the defendant did it of his own wrong, with a *traverse* of the custom, and an *issue*. *Han.* 2.

To a declaration for a disturbance of common ; a *plea*, that A. was seised of lands and demised them to S. for years ; and the defendant as executor to S. plowed up the lands, and a *traverse* of the prescription, and *issue*. *Tho.* 65.

To a declaration for digging turf ; a *plea* by a custom, that every inhabitant of an antient messuage in G. hath used to dig turf upon the

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the fold-course, and to lay the same upon the grafs to dry for fuel to be burnt in such a messuage, and the like custom for cutting furze ; *replication*, maintaining the declaration, and a *traverse* of the custom. *Wi. Ent.* 92.

A *plea*, that the plaintiff had not the liberty of a fold-course in the fields of *W.* except in his own lands. *Ro. Ent.* 50.

That the defendant himself was seized of the lands, and that he inclosed them as it is lawful for him to do ; and a *traverse* of the prescription laid by the plaintiff. A *replication*, and an issue upon the prescription. *3 Inst. Cl.* 317.

The defendant justifies by a grant of a free warren made by the dean, knights and canons of *Windfor*, and confirmed by act of parliament in the reign of *Ed. 4.* to which the plaintiff *demurs*. *Wi. Ent.* 77.

Not guilty as to part, and the defendant justifies the digging as a servant to *A.* upon a prescription to make necessary repairs ; *replication*, that the defendant did it of his own wrong ; a *rejoinder* and *issue*. *2 Mod. Int.* 252.

P *499. *The defendant pleads a justification as to the plowing, and traverses the prescription for *common*. *2 Mo. Int.* 155.

Pleas to Actions of Trover.

Not guilty. *1 Bro.* 358. *Bro. Met.* 20. *Wi. Ent.* 33.

Not guilty as to *part*, and to the residue the defendant pleads another action, and a recovery thereupon. *Tre. Tro.* 163.

The statute of limitations pleaded at large. *Tre. Tro.* 159.

That the defendant as bailiff of a manor, wherein the lord had the goods of waifs in the county of *Middlesex*, took the cattle there waived, and a *traverse*, that he is guilty in *London*. *Vid.* 8.

That the plaintiff licensed a stranger to pledge the goods as a security for monies lent thereon : A *replication*, that he did not license, and an issue. *Tho.* 62. *3 Instr. Cl.* 304.

That the defendant took the mare as an estray, and made proclamations, and put her to pasture ; and because the plaintiff would not pay the defendant for the pasture, he detained the mare till she escaped. *3 Instr. Cl.* 295. *Replication*, that the plaintiff offered to pay 13s. 4d. for amends, which the defendant refused to accept ; *Rejoinder*, protesting that it was not sufficient amends ; for *plea*, that the plaintiff did not tender, &c. *Bro. Red.* 94.

To an action of trover for an horse ; the defendant justifies as bailiff to the president and scholars of a royal college at *Cambridge*. *Bro. Red.* 102.

A *plea*, that the defendant bought the goods in an open shop in *London*. *Tho.* 62. *Tre. Tro.* 156, 161. *1 Brownl.* 357. *5 Co.* 83. The

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The like of a gold ring, with a *traverse*, that he knew it to be the plaintiff's gold ring. *Ro. Ent.* 30. 3 *Instr.* Cl. 294 *Ro. Ent.* 24. *Ro. Ent.* 449.

The like with a *replication*, that the defendant bought it of his own wrong, and a *traverse* of the sale in market overt, and an issue thereupon. *Ro. Ent.* 449. 1 *Brownl.* 158. 2 *Mo. Int.* 151. 3 *Instr.* Cl. 293.

A *plea*, that the goods were pledged to the defendant by the plaintiff for 22l. with interest; *replication*, maintaining the declaration, and a *traverse* of the pledging, &c. *Ro. Ent.* 43.

A *plea*, that the defendant as a captain of a man of war by the king's command, took the ship and goods as a prize, trading beyond sea contrary to the king's prohibition. *Bro. Red.* 69.

By an executor for gold chains; a *plea* as to part not guilty, and to the residue, that the defendant, wife of the testator, had the same in her husband's life-time for her apparel; and an averment, that he had goods sufficient to pay his debts, besides those gold chains; a *replication*, maintaining the declaration, and a *traverse*, that the goods of the testator, besides gold chains, were sufficient to pay his debts. *Ro. Ent.* 81.

To an action of trover for cattle; a *plea*, that by the custom of the city of London, live cattle bought and sold by foreigners in Smithfield market before nine of the clock in the forenoon were forfeited to the mayor; and that the plaintiff sold two heifers, which the defendant seized as a forfeiture; and a *traverse*, that they are guilty of a conversion at *W. &c. Tho.* 380.

A *plea*, that the plaintiff demised to the defendant a cottage with the goods; and it was agreed between the parties, that the defendant should make use of the goods for the term, and at the end of the term should deliver them, or pay the plaintiff a reasonable price for them, to be adjudged by *W.* who adjudged them to 5s. which the defendant tendered; a demurrer thereon. *Wi. Ent.* 31.

To a declaration for a gelding; a *plea*, that the plaintiff gave *T.* an authority to sell it, who agreed with the defendant, that he should try it, and if it was not found, or did not please the defendant, he should then redeliver it to *T.* and the defendant found the gelding unsound, and redelivered it to *T.* with an averment, that the gelding was in the same condition; *Replication* maintaining the declaration, and a *traverse* of the agreement. 1 *Brownl.* 356. 3 *Instr.* Cl. 298.

A *plea*, that the plaintiff obtained a verdict and judgment in trespass in the same court for the same cause, and the damages were assessed to two pence; *Replication*, that the two pence damages were not assessed for the value, or for the conversion of the sheep, but only for the taking and driving them away; and a *traverse* that the taking and driving, in that other action was the same as the conversion of the sheep, a special demurrer. *Wi. Ent.* 62, 99. P *500.

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A *plea* to an action of trover, that the goods were bought in an open shop in London; a *replication*, maintaining the declaration, and that the defendant delivered the goods to one R. who by fraud between him and the defendant, sold the goods to the defendant, with an intent to defraud the plaintiff; a *rejoinder*, maintaining the bar, and a *traverse* of the fraud, and an *issue* thereupon. *Wi. Ent.* 109. 3 *Instr. Cl.* 289.

To an action of trover for a boat; that the admiralty of England, by letters patent, had all wrecks upon the sea shore, or the shores of rivers within the ebbing and flowing of the sea. That J. an officer in the court of admiralty, took the boat floating in the river Thames, and sold it to the plaintiff; a *replication*, that the defendant within a year and a day after the seizure, claimed the boat, and an issue upon the claim. *Ro. Ent.* 445.

A *plea*, that the defendant levied a plaint in the court of Westminster against the plaintiff; and there was a summons, and an attachment thereupon awarded to the bailiff of the court, who attached the goods; and the plaintiff at the next court made a default, whereby the goods became forfeited to the lord, whereby the bailiff seized them, and delivered them to the defendant to be kept safe until, &c. and a *traverse*, that the plaintiff was possessed of the goods the day and year specified in the declaration. *Ro. Ent.* 447.

To a declaration by an executor of an executor; a *plea*, that the defendant seized of a messuage, demised it to the testator for a year rendering rent; and for the rent unpaid, he took the goods in the name of a distress, and a *traverse* of the conversion in the declaration; *Replication*, maintaining the declaration, and issue thereupon. *Ro. Ent.* 450, 451.

That the plaintiff acknowledged a statute staple to the defendant for 200l. who thereupon sued out a writ of extent, which he delivered to the sheriff, who by virtue thereof seized the plaintiff's goods, and delivered them to the defendant in part of satisfaction of the debt. *Ro. Ent.* 451.

Plas to Declarations in Actions of Deceit.

To a declaration for acknowledging satisfaction upon a judgment without a warrant; a *plea*, protesting that the plaintiff made him a warrant; for plea, that there was a concord between the parties. *Brownl.* 26.

That the plaintiff employed him to acknowledge satisfaction upon record; *replication*, denying the retainer, and issue thereupon. *Ro. Ent.* 38.

That the defendant was employed by the principal in the bond. *Ro. Ent.* 18.

A *plea*

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A *plea*, that the plaintiff retained the defendant to appear in one action, and requested him to appear for the plaintiff in all other actions; *Replication*, protesting that the plaintiff did not retain; for *plea*, that he did not retain the defendant to appear for him in all actions; *Rejoinder*, maintaining the request, and an *issue* thereupon. *Ro. Ent. 20. 1 Brownl. 33.*

To a declaration for putting in bail, and suffering a judgment without a warrant; a *plea*, that the plaintiff by awriting retained the defendant to put in bail, and to suffer judgment; *Replication*, that the plaintiff being illiterate, sealed a writing as an acquittance for the receipt of 20l. and not to retain the defendant; and so the writing is not his deed. *Br. Red. 91.*

That one *A.* retained the defendant to sue out a writ of *superfedeas* for the plaintiff, and to receive a declaration; who after praying an imparlance bid his servant require of the plaintiff an answer, who gave him none, so that the defendant for want of instructions, pleaded that he was not instructed; a *replication*, that *A.* did not retain the defendant, and an *issue*. *Ro. Ent. 99.*

To an action against a sheriff for a false return. A *plea*, that before an inquisition was taken, upon the writ of *capias utlagatum*, a prerogative writ issued from the court of exchequer, directed to the sheriff, to levy the king's debt, *by virtue whereof they seized all the goods of *D.* and had the monies before the barons of the exchequer; and that the defendant had no other goods; a demurrer thereto. *2 Ven. 37.*

Non cul' by the sheriff to an action for an escape, and a false return. *Ro. Ent. 9.*

The defendant pleaded, that the conveyance was made *bona fide*, and not fraudulent, but upon a good consideration; *Replication* maintaining the declaration, and a traverse of the matter pleaded in bar, rejoinder, and an *issue* upon the traverse. *Re. Dec. 87, 88.*

To Declarations for charging the plaintiff with crimes, &c.

To a declaration for a scandalous petition exhibited to the committee of parliament; a *plea* by protestation, &c. for *plea*, that the defendant caused the writing to be written in the form of a petition, and delivered it at the house of commons, according to the usual manner done by others; and it was approved of by a member of that house, with an averment, &c. a demurrer thereto, and judgment for the defendant. *1 San. 124.*

Two defendants plead not guilty. The others plead that they went to aid the constable to carry the plaintiff before a justice of the peace, and that the justice bound them over to prosecute the plaintiff at the next sessions, and to give in evidence what they knew of the matter. *Vid. 145.* *Replication*, that the defendants did it of their own wrong, and an *issue*.

References to Precedents

To Actions for malicious Indictments.

Not guilty pleaded to an action upon the case, for preferring a bill of indictment of felony, *Wi. Ent.* 96.

Not guilty by two or three defendants, and the attorney for the third confesseth judgment by *non sum informatus*. *Wi. Ent.* 98.

To a declaration for charging the plaintiff with ravishing a girl; one of the defendants pleads not guilty, and the other justifies. *Pl. gen.* 50.

The defendant pleads that he lost goods, and suspecting the plaintiff to have stolen them, he gave notice thereof to a constable and others, who upon searching found the goods in the plaintiff's possession; whereupon the constable carried him before a justice of peace, who upon an examination of the matter, committed the plaintiff to gaol, and took a recognizance from the defendant to prosecute; who caused a bill to be drawn and ingrossed against the plaintiff; and that the other defendant came to prove the goods to be the defendant's goods; a *Replication*, that they did it of their own wrong, and an *issue*. *Wi. Ent.* 107. *Wi. Rep.* 73.

Pleas to Declarations in Actions of Slander.

Not guilty pleaded, and a verdict for the plaintiff. *Wi. Ent.* 70.

The defendant pleads the statute of *limitations* at large. 3 *Instr.* Cl. 298.

That the defendant spoke other words, and *traversed* the words in the declaration. 1 *Bro.* 27. *Ro. Ent.* 94. *Pl. gen.* 31, 36. *Mo. Int.* 45. *Br. R.* 98. *Re. Dec.* 114. *Ec.* 3 *Instr.* Cl. 209. *Replication* and *issue*. *Id.* 211, 212, *Clift* 118. *Cl. Aff.* 114, 115. *Co. Ent.* 25, 29.

Protesting that the plaintiff was not of such a good reputation, &c. for *plea*, the defendant justified the words of perjury: for that the plaintiff being a sheriff, farmed the office of under-sheriff contrary to his oath, and the duty of his office; *Replication*, that the defendant spoke the words of his own wrong, and an *issue* thereon. *Bro. Red.* 97. Not guilty, as to speaking the words, and as to the residue, that he indicted the plaintiff by the command of the justice. 2 *Bro.* 14.

A justification of words, that he keeps a suspected bawdy-house; and a *traverse* of the words in the declaration, and an *issue*. *Cl. Aff.* 106.

Protesting, that the declaration is insufficient; for *plea*, the defendant justifies his speaking the words in the declaration. *Bro. Vad.* 117. *Replication*, that he spoke them in his own wrong, and an *issue*.

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The defendant *justifies* words spoken of a *Sheriff*. 3 *Inst.* Cl. 214. replication, and issue.

* The like of *exhibiting* a *petition* to the justices of peace of the P * 502. ill behaviour of the plaintiff. *Ro. Ent.* 74. plaintiff demurs. 3 *Inst.* Cl. 216. defendant *justifies* exhibiting a *petition* to the committee for grievances. *Id.* 218. plaintiff demurs, a special *justification*, and a *demurrer* with notes thereon. *Ro. Ent.* 71.

To a *declaration* for words of *theft*; a *plea*, that the plaintiff was a felon, and had feloniously taken a pig, upon which the defendant spoke the words. *Bro. R.* 99.

The like for stealing goods. *Mo. Int.* 44, 47. *not guilty* pleaded thereto. For that the plaintiff was indicted for the same offence, *Ec.* 2 *Mo. Int.* 136.

The like for stealing sheep; *Replication* by the act of a general pardon; a special *demurrer* thereto, and *judgment* for the plaintiff. *Ro.* 71.

To the like declaration a *plea*, that the defendant's house was broken open by thieves committing burglary, and that the plaintiff was one of them. *Han.* 66. *Tho.* 72. 2 *Inst.* Cl. 229, 231.

A *justification*, for that the plaintiff had committed *felony*. 2 *Mo. Int.* 137.

To the like declaration a *plea*, that the plaintiff had stolen three ounces of silver plate, whereupon the defendant spoke the words; *Replication*, that they were spoken by the defendant of his own wrong, and issue. 1 *Saund.* 243.

That the plaintiff had feloniously stolen a hog'shead of the defendant's. *Cl. Aff.* 94.

To a declaration for words of *murder* and *theft*; a *plea*, that the plaintiff was an accessory to the murder, and a receiver of stolen goods; *Replication*, protesting that he was not accessory, nor knew of the felony; for plea a *demurrer*. *Pl. gen.* 38.

That the plaintiff struck *M. T.* upon which she died. 2 *Mo. Int.* 136.

Husband and wife *justify*, for that the plaintiff murdered his wife; *Replication*, that the words were spoken of the defendant's own wrong, and an *issue*. 3 *Inst.* Cl. 222.

Defendant *justifies* for charging the plaintiff with felony, because he had stolen plate; *Replication*, that the words were spoken by the defendant of his own wrong, and an *issue*. 3 *Inst.* Cl. 224.

The defendant *justifies*, for that the plaintiff stole his sheep; and an *issue* thereon. *Id.* 227.

Justification, for that the cup was found upon the plaintiff; *Replication*, that the words were falsely and maliciously spoken; with a *traverse*, and *issue*. *Id. ibid.*

Justification, for that the plaintiff had stolen a horse; *Replication*, that the words were spoken by the defendant of his own wrong. *Id.* 229.

For

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For words of *murder*, that the plaintiff undertook to administer medicines to one sick, who by means thereof died; whereupon the defendant did speak the words. *Tho.* 69. The like, *Mo. Int.* 135. The like, 3 *Inst. Cl.* 223.

To a declaration of *perjury*; a *plea*, that the plaintiff was perjured as a witness at the *nisi prius*; *Replication*, that the words were spoken by the defendant of his own wrong. *Tho.* 65. the like, 3 *Inst. Cl.* 234, 237.

The like *plea* as a witness at the sessions of the peace, the like *Replication*, *Bro. R.* 60.

The like as a witness upon interrogatories in chancery. *Pl. gen.* The like upon an answer in chancery. *Clift* 103.

The like before the king and council; *Replication*, that words were spoken by the defendant of his own wrong. *Pl. gen.* 28.

The defendant justifies the word of *perjury*, for that the plaintiff being sworn at a court-leet, revealed the secrets of the jury. *Bro. Va.* 118.

A *plea*, for that the plaintiff swore himself in an *issue*, concerning the limits of a parish. 2 *Mod. Int.* 134.

For that the plaintiff sold wares by false weights. 3 *Instr. Cl.* 232. *Replication*, that the defendant spoke the words of his own wrong.

For that the plaintiff owed the defendant the money demanded; *Replication*, that the words were spoken by the defendant of his own wrong. 3 *Inst. Cl.* 233.

The defendant justifies, for that he was upon the inquest by which the plaintiff was indebted; *Replication*, that there is no such record; *Rejoinder*, that there is such a record. *Id.* 582.

P *503. *To a Slander of a *title*, defendant pleads, and shews a covenant and uses, and so justifies. *Id.* 239, *Ec. Co. Ent.* 34.

To an action for words spoken of an attorney, that the plaintiff was presented by a jury of attorneys for misbehaviour; and afterwards struck out of the roll of attorneys by the justices, *Ec.* whereupon the defendant did speak the words; a *replication*, that the defendant spoke them of his own wrong, and a *traverse*, that he was struck out of the roll by the judges; a *demurrer* thereto. *Ra. Ent.* 107.

Pleas to General Torts.

To an action for digging so near the foundation of the plaintiff's house, that, *Ec.* the defendant pleads a *recovery* in a former action of trespass; and that damages were recovered for the same tort. *Lev. Rep.* 133.

To an action brought against one who spoiled the plaintiff's hogheads filled with wine, (*being in the street before the plaintiff's door*) with a coach and horses; the defendant pleads, that the hogheads

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hogheads were set in the highway, whereby the passage was stopped, and the defendant carefully passing by with his coach, removed one of the hogheads; a *replication*, that the defendant spoiled the hogheads of his own wrong, by reason whereof one of the hogheads fell into the cellar, and was broken, and the wine spilled. An *issue* thereon. *Bro. Red. 92.*

To an action for negligently keeping the defendant's fire; the defendant *pleads*, that somebody unknown to him, set fire to the house adjoining to the plaintiff's house, and a *traverse*, that he negligently kept his fire. 1 *Brownl. 29.* 3 *Inst. Cl. 337.*

That the defendant did not burn down the mill in such manner and form, &c. *Bo. Ent. 65.*

To a declaration against an inn-keeper, that the defendant gratis lodged the plaintiff, and a *traverse*, that the plaintiff kept a common inn. 2 *Mo. Int. 147.* 3 *Inst. Cl. 340.* *Replication* and an *issue* upon the *traverse*.

To a declaration in an action for keeping a dog, which bit the plaintiff. The defendant *pleads*, that he did not knowingly keep a dog accustomed to bite men. 1 *Brownl. 29.*

To a declaration for losing a horse by negligence, the defendant *pleads*, that the plaintiff requested the defendant to put his horse to grafs, which being so put, was carried away by thieves. And *traverse*, that it was taken away by the negligence of the plaintiff or his servants. A *Replication*, maintaining the declaration, and a *traverse*, that the plaintiff requested the defendant to put the horse to grafs. *Ro. Ent. 23.* 3 *Inst. Cl. 346.* And an *issue* upon the *traverse*.

A *plea*, taking a *protestation*, that the goods were not put into the inn; for *plea*, that they were not taken away by thieves. 3 *Inst. Cl. 339.*

A *plea*, that the defendant kept the plaintiff's horse well, and sufficiently, and *traverse* the negligence. *Ra. Ent. 3.*

That a mare which was hired died of divers distempers; and *traverse*, that the defendant over-loaded her. *Hern. 101.*

To a declaration against an attorney, for appearing without a warrant; a *plea*, that the plaintiff retained the defendant to appear. *Ash 39.*

To a declaration for cancelling a bond; a *plea*, that the plaintiff upon payment of the money, delivered up the bond to the defendant by way of acquittance, whereupon the defendant cancelled it.

A *plea*, taking a *protestation*, that the plaintiff delivered the writing to the defendant to carry and deliver it to another, and that the defendant did so deliver it; for a *plea*, that the defendant was not guilty of the obliterating. &c. *Ra. Ent. 7.* *Vet. Int. 20.*

A *plea*, taking a *protestation*, That there is no truth in the declaration: for a *defence*, that the plaintiff did not deliver to the defendant the writing to look on; a *demurrer*, for that the *plea* did not answer

References to Precedents, &c.

answer the matters in the declaration. *Ra. Ent. 7. Vet. Int. 163.*

To an action brought by church-wardens for cutting trees in the church-yard, which by custom ought to have been for the repairs of the church-yard, A *plea*, that the defendant as rector, was seised of the church-yard in right of *his rectory cut down the trees; and a *traverse*, that the fences of the church-yard wanted repairs.

P * 504.

To an action upon the case against the *overseers* of the poor, for unduly felling a cow, and not returning the overplus: A *plea*, as to all, but returning the overplus *not guilty*; and as to that, a *tender* and refusal to accept. *Hern 235.*

A *plea*, that it belonged to the *custos brevium* to indorse the three last proclamations of the fine, and a *traverse*, that it belonged to the chirographer to indorse all the proclamations. *Co. Ent. 17.*

To an action for carrying away wood prepared for smelting iron: A *plea*, that T. sold the defendant one hundred cords of wood to be cut down, &c. a *replication*, that T. sold the wood before to S. who sold it to the plaintiff; a *rejoinder*, maintaining the bar, and a *traverse*, that T. sold the wood to S. *Co. Ent. 56.*

APPEN-

APPENDIX.

SOME FEW CASES RELATING TO PLEAS IN ABATEMENT,
NOT BEFORE INSERTED UNDER THAT TITLE.

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1. **T**HAT there needs no plea to abate a writ, which is of itself abateable. 2 *Roll's Rep.* 272.
 2. Where a writ shall abate of itself, and where not but by plea. 1 *Bulst.* 5. *Earl of Shrewsbury v. Earl of Rutland.* 2 *Roll's Rep.* 272.
 3. Where the court will abate a writ *ex officio.* 1 *Roll's Rep.* 176. *Cro. Eliz.* 22, 121. *Palmer* 270, 311.
 4. What shall abate a writ of error, and what not. 2 *Bulst.* 230. *Huxley v. Harrison,* 2 *Bulst.* 159. *Heydon v. Godsole* and others.
 5. Where a writ of waste shall abate by death. 1 *Roll's Rep.* 82.
 6. A writ false in part, is not like the action not lying for part, but shall abate the writ in the whole. 1 *Roll's Rep.* 307.
 7. That by pleading over, the defendant loses the advantage of a matter in abatement of the writ. 2 *Roll's Rep.* 176. *Cro. Eliz.* 554.
 8. That to plead a bond made to three, and not to two, to an action brought by three is in abatement, and not in bar. *Cro. Eliz.* 202.
 9. Where a writ of *quare impedit* shall not abate without plea. *Palmer* 309.
 10. Where the declaration is against one on a bond or indenture, and upon *Oyer* it appears, two are bound or covenant. *Palmer* 398. *Constable v. Clobury.*
 11. The

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11. The wife named before her husband. *Palmer* 33.
12. The plaintiff declaring for more damages, than is contained in his original. *Palmer* 193.
13. That the writ bore *teste* before the letters of administration. *Lut.* 9. *Walford v. Siwil.*
14. A plea by an executor, that the testator was alive at the day of the writ purchased. *Lut.* 13, 16. *Marshal v. Burnet.*
15. That the writ was brought before the money due. *Lut.* 1642. *Simpson v. Garfide.*
16. Where a plea of excommunication was ill. *Lut.* 19. *Bradley v. Glynn.*
17. Administrator pleads that he is administrator *durante minori etate*, and ill pleaded for want of concluding with an averment. *Lut.* 20. *Little & Ux. v. Plant.*
18. That coverture is not pleadable after an imparlance, and a replication by way of estoppel. *Lut.* 23. *Bartelet v. Burton.*
19. To a *scire facias*, that there were but 14 days between the *teste* and return of the writ. *Lut.* 25, 26. *Naers v. the Countess of Huntington.*
20. A plea by an executor, that he is an administrator granted by the dean of *Canterbury* during the suspension of the archbishop; and ill, because the defendant did not say that there were *bona notabilia*. *Lut.* 29, 30. *Young v. Case.*
21. Another action depending, pleaded upon a writ directed to the sheriff of *Wilts*; replication, that nothing was done upon that writ, but that there was another writ of the same *teste* directed to the sheriff of *Southampton*; and the defendant appeared to that writ, and thereupon he declared, and the judgment was for the defendant, because the action appeared to be brought in *Middlesex*, and so the plaintiff had falsified his own writ. *Lut.* 33, 34. *Bowler v. Spatchurst.*
- P * 506. * 22. A plea, that the plaintiff's testator was an alien; replication, that he staid in *England* by licence, &c. judgment, *quod respondeat ouster*. *Lut.* 34, 35. *Wells v. Williams.*
23. A plea to a *formedon* in descender of entry into part, held repugnant and inconsistent with the other part of the plea. *Lut.* 37, 38, 39. *Mosley v. Coldwell.*
24. In dower, that the demandant is waived; judgment for the tenant, though several exceptions to the plea. *Lut.* 39, 40. *Draycot v. Curzon.*
25. Matter in abatement concluded in bar, the court gave judgment as upon a plea in bar. *Lut.* 42. *Wallis v. Savil.*
26. Where a special imparlance was not well entered, so that the plea of privilege by means thereof was ill. *Lut.* 45. *Wentworth v. Squib.*
27. A plea in abatement, that two other obligors were also bound. *Lut.* 695, 697. *Sayer administrator, &c. v. Chayer.*
28. Where

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28. Where the defendant pleads, that he is administrator, and not executor, is ill, without a traverse of his having administered the goods before administration granted. *Lut.* 889. *Grey* executor, *Ec. v. Thorowgood & Ux'* administrator, *Ec.* 2 *Ven.* 179, 180. The same point adjudged.

29. To an action of waste, that the plaintiff's title was by devise, and a traverse of the descent. *Lut.* 1558. *Ferrers v. Williams.*

30. Outlawry in the testator, pleaded to an action brought by an executor. *Lut.* 1603. *Powis* executor *v. Williams.*

31. To a declaration upon several *assumpsits* brought by the wife; the defendant pleads, that after the writ purchased, the plaintiff married *H. D.* replication, that after the writ purchased, she did not marry *H.* to which there was a demurrer, because that the replication doth not affirm that the plaintiff was sole; and another exception was taken, that by the replication, the time of the marriage is made part of the issue, for it is that after the writ purchased, *Ec.* she did not marry *H. D.* whereas, if she was married before the writ, it ought to abate; but it seems the plaintiff had judgment. *Lut.* 1638, 1639, 1640, 1641. *Pearson v. Hulfe.*

32. Where a writ of error to reverse a *fine*, brought by *A.* and *D.* tenants for life, and *E.* the remainder-man an infant, was adjudged to abate only as to the infant. 1 *Leon.* 137.

33. Where a writ of error in *covenant* did not abate, though the defendant was called assignee of *C.* in the writ of covenant, but assignee, *Ec.* omitted in the writ of error. *Dyer* 356. *pl.* 41.

34. A writ of error, returned by the mayor, aldermen, and deputy-recorder abated, it being directed to return a record before the mayor, aldermen and recorder. *Stiles* 203.

35. The defendant in error cannot plead outlawry of one of the plaintiffs in error. *Cro. Jac.* 616.

36. Where the defendant pleaded an outlawry, and the plaintiff replied *nul tiel record*, and at the time of the plea the plaintiff was outlawed, but he reversed it before the day of bringing in the record, thereupon a *respondeas ouster* was awarded. *Cro. Jac.* 484.

37. Where the defendant concludes his plea in *abatement*, and the plaintiff his replication in *bar*, or demurs, and concludes as in a demurrer to a plea in *bar*, it is a *discontinuance*. *Carthew* 138. 1 *Show.* 155.

38. There cannot be two pleas in disability of the plaintiff, but where the second plea arises from a matter subsequent to that contained in the first. 3 *Leon.* Case 222.

39. The *dampnum* in the declaration being more than the *dampnum* in the writ, it was adjudged it would not abate the writ. *Cro. Jac.* 108.

40. One partner cannot plead a *misnomer* of the other. *Lut.* 36. nor bail *misnomer* of the principal. *Mod. Cases* 289.

41. Where a writ of *covenant* was not abated but amended. 5 *Co.* 45. *Gage's Case.*

42. Where

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- P *507. *42. Where a writ of *quare impedit* shall abate by the act of the plaintiff. 7 Co. 27.
43. Where a writ of *quare impedit* was not abated but amended. Goldsb. 78.
44. Where a plea of no such person as the ordinary in *rerum natura*, pleaded in a *quare impedit*, abated the writ. Hutton 31. Coppledich v. Tansey.
45. Where a writ is brought against three, and they plead as to one of the defendants there is no such person, the writ shall abate as to him only. Plow. 9.
46. Where a *quare impedit* did not abate by the death of the wife. Winch 73.
47. Where a *formedon* shall abate by the omission in the pedigree of an eldest son who survived his father. 8 Co. 88.
48. Where a writ of *quod ei deforceat* was not abated, which had not shewn the respective qualities of the lands, how many of furze, and how many of heath. Cro. Car. 178.
49. Where a writ of trespass *quare filium & hæredem rapuit & maritavit* was held good, omitting to alledge that the marriage belonged to the plaintiff. Stile 303.
50. An action of trespass was brought against a parson, for taking tithe corn, which the plaintiff claimed as a portion of tithes in right of his wife, and laid the trespass the 27th of August, 29 Eliz. and it appeared upon evidence, that the plaintiff delivered the defendant a license to be married, dated the 28th of August, 29 Eliz. This matter was adjudged to abate the writ. 1 Leon. 104. Parvlet v. Lawrence. Q. if this be law, for the day of the trespass laid in the declaration is not material, unless made so by matter contained in the pleadings.
51. Where the writ was adjudged not to be abated in an action brought by the master for beating his servant, whereby the plaintiff lost his service for the space of six months, though the original appeared to be sued out before the six months were expired. Hob. 284.
52. Where the writ in ejectment abated, it appearing to be sued out before the cause of action Cro. Car. 272, 281. Johns v. Stayner, 5 Co. 37.
53. Where an entry into part of the lands, pending the suit, abates the writ. Stile 260.
54. An action of debt was brought upon a bond, with a condition to deliver twenty quarters of wheat. The defendant pleaded, pending the suit, an acceptance of fifteen quarters, and adjudged *no plea*; for it is collateral, and not part of the sum contained in the bond; and if it be a plea, it is a plea in bar, and not in abatement; and judgment was given for the plaintiff. Cro. Eliz. 253. Stone v. Radish.

55. And

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55. And where such matter was pleaded in *bar*, and found for the plaintiff, it was held to be aided by the statute of *jeofails*. *Cro. Eliz.* 260. *Andrews v. Kirk*.

56. Where an action was brought upon a *bond* of 80*l.* and the defendant pleaded an *attachment* of 40*l.* by the custom of *London*, in satisfaction of so much due upon this bond, (*pendente lite*) all the court (except *Popham*) held this to be a plea in *bar*, and not in *abatement* of the bill. *Cro. Eliz.* 342. *May v. Middleton*. *Moor* 598.

57. Where the tenant in special tail brings an action of *waste*, and the issue dies, the writ abates. 1 *Leon.* 330.

58. Where the writ in an action of *waste* was held not abated, though the action was brought by two coparceners, and the heir of the third, and three objections; 1. That the writ set forth, that *R. L.* the father, *cujus hæredes ipsæ sunt, dimisit*, whereas it should have been *cujus hæredes de corpore ipsæ sunt*; for that the reversion was entailed on the heirs of the body of *R. L.* 2. That the writ was *quod tenuerunt*, which * (say they) signifies a joint possession. P * 508.
3. That the plaintiffs had not named the tenant by the curtesy, husband of the third coparcener. *Godb.* 114. *Lewknor v. Ford*.

59. Where an *audita querela* abated, because the parties ought to have had separate writs, and not to have joined their two matters of complaint in one. *Owen* 106.

60. Where it was held that the party ought to have pleaded his *privilege* before he was turned over to the marshal upon a *habeas corpus*, but that it was then too late. *Stiles* 222. *Moor v. Earl Rivers*.

61. If there is a plea in *abatement*, and a *respondeas ouster*, and no notice taken of it on the plea-roll, the plaintiff cannot have judgment. *Carthew* 499. *Dobertine v. Chancellour*.

62. The defendant cannot plead *antient demesne* without a rule of court for that purpose. 5 *Co. Rep.* 105. a. How *antient demesne* is to be tried. 9 *Rep.* 31. a.

63. Where the defendant pleaded in *abatement* to a *sciri facias*, to have execution upon a recognizance, that *A. S.* was seized of three acres not named in the writ, and upon an issue joined thereon, the jury find, that *A.* and *J. S.* were jointenants of the three acres; the issue was adjudged to be found for the plaintiff. *Gouldsb.* 160.

64. Of *abatement* of an appeal. *Vide* 1 *Bull.* 69 to 84.

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A
T A B L E
T O T H E
A B R I D G E D C A S E S.

Subdivided into particular HEADS.

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F I N I S.

J. Coe